Case and Comment
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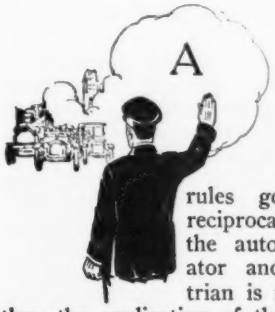
Reciprocal Duty of Automobile Operator and Pedestrian

BY ERNEST L. DAVIS

Of the Ohio Bar



AS is so frequently true with respect to legal principles, the statement of the general rules governing the reciprocal duties of the automobile operator and the pedestrian is much simpler than the application of those principles to specific cases. The unusual uniformity in the principles laid down by the courts indicates a universal satisfaction therewith, which is strong evidence on behalf of the correctness and justice of those principles.

This unanimity is due to the fact that the courts, in constructing this great addition to the law, have universally laid for their foundation the impartial principle that a pedestrian and an automobilist have equal rights in the street.[1] This rules applies not only to cross walks,[2] but also to any point in the street [3] where a pedestrian may wish to go. It applies with like force where he is deposited by a public conveyance at a point in the street not located on the cross walk,[4] and where he crosses diagonally [5] from one side of the street to the other. The Massachusetts court has said in this connection [6]: "There is no law or principle of law or of reason which confines foot passengers to particular crossings. Such a restriction would be very incon-

[1] Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285, 3 L.R.A.(N.S.) 345; Minor v. Stevens, 65 Wash. 423, 118 Pac. 313, 2 N. C. A. 309, 42 L.R.A.(N.S.) 1178; Bongner v. Ziegenhein, 165 Mo. App. 328, 147 S. W. 182; Vesper v. Lavender, — Tex. Civ. App. —, 149 S. W. 377; O'Dowd v. Newnham, 13 Ga. App. 220, 80 S. E. 36; Brown v. Brashear, 22 Cal. App. 135, 133 Pac. 505; Dugan v. Lyon, 41 Pa. Super. Ct. 52; Hannigan v. Wright, 5 Penn. (Del.) 537, 63 Atl. 234.

[2] Miller v. New York Taxicab Co. 120 N. Y. Supp. 899.

[3] Foster v. Curtis, 213 Mass. 79, 99 N. E. 961, Ann. Cas. 1913E, 1116, 42 L.R.A.(N.S.) 1188.

[4] Ibid.

[5] Diamond v. Cowles, 98 C. C. A. 417, 174 Fed. 571.

[6] Foster v. Curtis, supra.

venient and annoying. The street should be kept in such condition that foot passengers may be able to cross, with a reasonable degree of safety, using proper care themselves, at any and all places. The necessity of this might be illustrated very fully by reference to the common and ordinary course of business. A person who is left by an omnibus in the middle of the street should be able to go in safety to the sidewalk, at the nearest point, and not be compelled to make his way among the carriages in the middle of the street till he can reach a place particularly set apart and designated for the purpose of crossing."

This rule of equal rights applies also in behalf of blind persons,[7] lame persons,[8] and children.[9]

All parties using a highway must exercise reasonable care;[10] the pedestrian to prevent injury to himself,[11] the operator to prevent accident or injury to others.[12] The duty of the operator is the same as that which the law imposes on the driver of a team, except that the greater speed calls for greater watchfulness.[13] Greater care is required of the operator at street crossings and in the more congested districts than in the less obstructed streets in other parts of the city.[14] And where the peril of a pedestrian is discovered by the operator, a new duty arises to exercise all reasonable care to avoid injury.[15]

While the drivers of automobiles enjoy the same rights on the highways as are possessed by pedestrians, the nature of the duty imposed upon them is to be viewed and determined as commensurate with the risk entailed through the probable dangers attending the particular situation.[16] Thus, the degree of diligence which must be exercised in a particular exigency is such as is necessary to prevent injuring others; and in considering whether the operator of an automobile has exercised due diligence, the character of the instrumentality which he was operating, and the danger attached to its operation, as well as the character of the highway and the probability of inflicted injuries, are all to be taken in account.[17]

In a discussion of the reciprocal rights of pedestrians and automobilists the Georgia court says:[18] "The pedestrian and the automobile have equal rights upon the highway, but their capacity for inflicting injury is vastly disproportioned. It follows, also, from this, that the driver of an automobile cannot be said to be using the highway within his rights, or to be in the exercise of due care, if he takes advantage of the force, weight, and power of his machine as a means of compelling pedestrians to yield to his machine superior rights upon the public highway, designed for the use of all members of the public upon equal terms. Instances are almost a matter of daily occurrence where apparently the drivers of automobiles operate their machines as if they have been granted a right of way over the public highways, and as if it is nothing more than the duty of the pedestrian to yield precedence to the automobile, and to stop and wait until the automobile has passed before attempting to proceed in crossing a street or otherwise using the highway. If there is anything in the argument of priority, man was created

[7] McLaughlin v. Griffin, 155 Iowa, 302, 135 N. W. 1107.

[8] Millsaps v. Brogdon, 97 Ark. 469, 134 S. W. 632, 32 L.R.A.(N.S.) 1177.

[9] Rasmussen v. Whipple, 211 Mass. 546, 98 N. E. 592.

[10] Minor v. Stevens, 65 Wash. 423, 118 Pac. 313, 2 N. C. C. A. 309, 42 L.R.A.(N.S.) 1178; Vesper v. Lavender, — Tex. Civ. App. —, 149 S. W. 377; Winner v. Linton, 120 Md. 276, 87 Atl. 674; Grier v. Samuel, — Del. —, 86 Atl. 209; O'Dowd v. Newnham, 13 Ga. App. 220, 80 S. E. 36.

[11] Minor v. Mapes, 102 Ark. 351, 144 S. W. 219, 39 L.R.A.(N.S.) 214; Brown v. Brashear, 22 Cal. App. 135, 133 Pac. 505; Millsaps v. Brogdon, 97 Ark. 469, 134 S. W. 632, 32 L.R.A.(N.S.) 1177.

[12] O'Dowd v. Newnham, 13 Ga. App. 220, 80 S. E. 36; Goldblatt v. Brocklebank, 166 Ill. App. 315; Brown v. Brashear, 22 Cal. App. 135, 133 Pac. 505; Millsaps v. Brogdon, 97 Ark. 469, 134 S. W. 632, 32 L.R.A.(N.S.) 1177.

[13] Williams v. Benson, 87 Kan. 421, 124 Pac. 531.

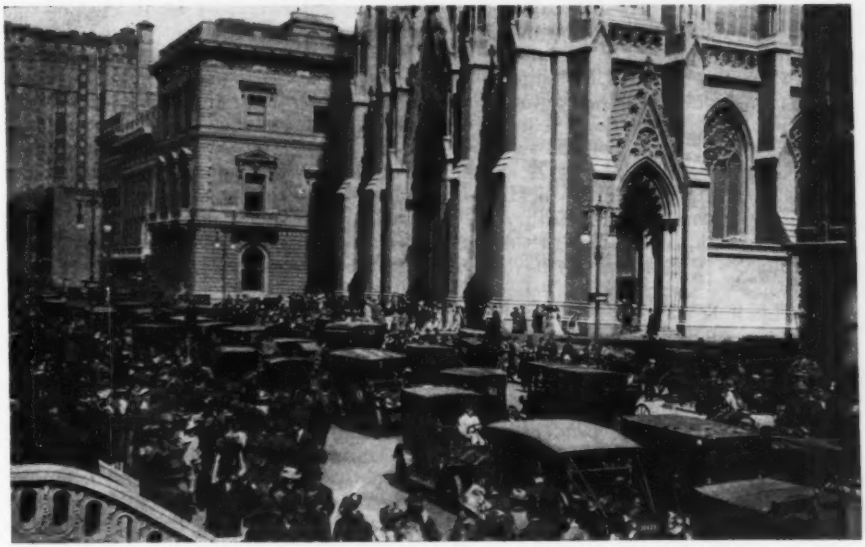
[14] Grier v. Samuel, — Del. —, 86 Atl. 209; Brown v. Wilmington, — Del. —, 90 Atl. 44.

[15] Eisenman v. Griffith, 181 Mo. App. 183, 167 S. W. 1142; Mosso v. E. H. Stanton Co. 75 Wash. 220, 134 Pac. 941, L.R.A. —.

[16] Bongner v. Ziegenhein, 165 Mo. App. 328, 147 S. W. 182.

[17] O'Dowd v. Newnham, 13 Ga. App. 220, 80 S. E. 36.

[18] Ibid.



Photograph by Underwood & Underwood, N. Y.

SCENE ON FIFTH AVENUE, NEW YORK.

A typical situation involving the relative rights of automobilists and pedestrians.

before the automobile, and, to paraphrase a quotation from Holy Writ, man was not created for the automobile, but the automobile was created for man. Generally, the natural instinct of self-preservation will inspire in the pedestrian a due degree of caution for his own safety, when he is aware of the approach of an automobile, and this the law will require him to exercise. Sometimes the circumstances surrounding the approach of one of these vehicles of ponderous proportions inspire a terror which paralyzes the power of locomotion on the part of the traveler on foot,—especially if he be a child of tender years. In such a case, the dangerous character of the instrumentality which the driver of an automobile is operating forbids the assertion that he has exercised even ordinary diligence, unless he has used every possible means to avoid injury to the pedestrian. On account of the ease with which injury can result from the slightest negligence or inattention in the operation of his machine, ordinary diligence requires that the driver of an automobile be constantly on the lookout, and that he have his machine in such condition as that it shall be under his perfect control. The pedestrian also is required to be on the lookout; but he has the right to assume that the drivers of all automobiles are on the lookout for him too, and if he is properly upon the public highway, which he is entitled to use equally with them, he has the right to assume that they are both willing and able to regard his rights. While, therefore, the law requires that a pedestrian and the driver of an automobile shall each anticipate the presence of the other upon the public highways, and that neither shall do any act likely to jeopardize the safety of the other, still, on account of the great disparity in their respective capacities to inflict injury, the exercise of ordinary diligence on the part of the pedestrian to look out for automobiles does not necessarily require as continuous caution as is requisite to enable an automobilist to fulfil the definition 'ordinary diligence' as applied to one having in his charge a dangerous and death-dealing instru-

mentality." The care required of a pedestrian to prevent injury to himself imposes upon him no imperative duty to be continuously looking or listening to ascertain whether automobiles are approaching,[19] but he is required to make reasonable use of all his senses to avoid danger.[20] He is not, however, chargeable with contributory negligence for failure to run to avoid injury.[21]

The extent and limitations of the general principles already set out have been well defined by many applications to diverse situations. One of the most important questions in connection with which these principles arise is that of speed. One operating an automobile must use all the care and caution which an ordinarily careful and prudent driver would exercise under the circumstances.[22] He is bound to use ordinary care in its operation, to move it at a reasonable rate of speed, and to cause it to slow up, if need be, where danger is imminent;[23] and no blowing of a horn or ringing of a bell or gong, without an attempt to slacken speed, is sufficient to exempt the operator from liability, if the circumstances demand that the speed be slackened or the machine stopped.[24] The automobile operator is not necessarily exempt from liability for a collision by showing that at the time of the accident he was not running at a rate of speed exceeding the limit allowed by law; but he still remains bound to anticipate that he may meet persons at any point in the street; and he must keep a proper lookout for them, and keep his machine under such control as will enable him to avoid a collision by using care and caution, and if necessary he must slow up, and even stop.[25]

Where the maximum rate of speed is fixed by law, the operation of an automobile at a rate of speed in excess thereof amounts to negligence.[26] But the mere fact that the driver of an automobile is violating a speed ordinance when it strikes a pedestrian does not preclude the court from finding the pedestrian's negligence in walking heedlessly into the street to be the proximate cause of his injury.[27] But while the wrongful conduct of the driver of an automobile in operating his machine at an excessive rate of speed will not excuse a pedestrian crossing the street from the exercise of ordinary care, yet such a person, in the absence of knowledge to the contrary, has a right to presume that all persons using the street, including drivers of vehicles, will use ordinary care to avoid injuring him, and has a right to presume that automobiles will not be run at an unlawful or dangerous rate of speed, but that they will be operated at such a rate and with such care as reasonable prudence requires in view of all the conditions and circumstances.[28] If, however, the pedestrian knows that a machine is being operated upon a street in a negligent, reckless, or unlawful manner, a special duty arises to use such additional care as reasonable prudence would dictate.[29]

It has sometimes been urged that a pedestrian must stop, look, and listen before crossing the street. The cases seem to be unanimous that such is not the rule.[30] In holding that the "look and listen" law, applicable to railroads,

[19] Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285, 3 L.R.A.(N.S.) 345; O'Dowd v. Newnham, supra; Apperson v. Lazro, 44 Ind. App. 186, 87 N. E. 97, 88 N. E. 99; Arseneau v. Sweet, 106 Minn. 257, 119 N. W. 46; Lampe v. Jacobsen, 46 Wash. 533, 90 Pac. 654; Tiffany & Co. v. Drummond, 93 C. C. A. 469, 168 Fed. 47.

[20] Grier v. Samuel, — Del. —, 86 Atl. 209.

[21] O'Dowd v. Newnham, 13 Ga. App. 220, 80 S. E. 36.

[22] Kessler v. Washburn, 157 Ill. App. 532.

[23] Hannigan v. Wright, 5 Penn. (Del.) 537, 63 Atl. 234.

[24] Kessler v. Washburn, supra.

[25] Ibid.

[26] Delfs v. Dunshee, 143 Iowa, 381, 122 N. W. 237; Zoltovski v. Gzella, 159 Mich. 620, 134 Am. St. Rep. 752, 124 N. W. 527, 26 L.R.A.(N.S.) 435.

[27] Davis v. John Breuner Co. 167 Cal. 683, 140 Pac. 586.

[28] Rump v. Woods, 50 Ind. App. 347, 98 N. E. 369.

[29] Ibid.

[30] Goldblatt v. Brocklebank, 166 Ill. App. 315; Jessen v. J. L. Kesner Co. 159 App. Div. 898, 144 N. Y. Supp. 407; Bachelder v. Morgan, 179 Ala. 339, 60 So. 815; Barbour v. Shebor, 177 Ala. 304, 58 So. 276; Adler v. Martin, 179 Ala. 97, 59 So. 597; Williams v. Benson, 87 Kan. 421, 124 Pac. 531; Bongner v. Ziegenhein, 165 Mo. App. 328, 147 S. W. 182; Dugan v. Lyon, 41 Pa. Super. Ct. 52; Millsaps v. Brogdon, 97 Ark. 469, 134 S. W. 632, 32 L.R.A.(N.S.) 1177; Tiffany & Co. v. Drummond, 93 C. C. A. 469, 168 Fed. 47.

has no application to pedestrians about to cross a street, the Alabama court says:[31] "There is no warrant in law for such application. A railroad acquires a right of way for the express purpose of running trains at a rapid rate of speed over the same, and travelers on the public highways, knowing this fact, are required to observe due caution in approaching the tracks. Even as to street railroads, the tracks mark the line of danger, so that the pedestrian knows just where to look and how to avoid the point of peril; but automobiles have no special privileges in the streets, more than other vehicles. They simply travel upon the streets with the same privileges and obligations as other vehicles, and the mere fact that they can run faster than other vehicles does not give them any right to run at a dangerous rate of speed, any more than the fact that one man drives a race horse gives him the right to travel the streets at a higher rate of speed than another who drives a plug. The simple rule is that drivers on the streets, and pedestrians, each recognizing the rights of the other, are required to exercise reasonable care."

But while it is not negligence, as a matter of law, for one to attempt to cross a public street without looking or listening for the approach of automobiles, still the jury may find from the existing circumstances that a failure to look or listen constitutes negligence.[32] And it has been held that a pedestrian is guilty of contributory negligence where he attempts to cross a busy street at a place where pedestrians are not supposed to cross, walking rapidly and looking in a direction nearly opposite to that in which he is going, and emerging from behind a wagon into the path of vehicles, without looking for approaching traffic.[33]

The great number of cases in which the presence of a street car has had an important part has given to that phase of the law an unusual definiteness, when the extreme youthfulness of automobile law in general is taken into consideration. In these cases the general principles set out above are exemplified and applied. Where an automobile driver sees a street car, and sees that it has stopped at a regular stopping place, he is bound to assume that passengers are likely to be discharged, and should have his machine under proper control to avoid accidents.[34] It is his duty to exercise very great care in passing, to avoid injuring persons going to or from the car.[35] The fact that a person, in alighting from a street car, does not look in the direction from which the automobile is approaching, but directs his attention to alighting in safety, is not sufficient to charge him, as a matter of law, with contributory negligence.[36] Where an ordinance prohibits automobiles from running within a certain distance of standing street cars, a passenger alighting from a car has the right to assume that he occupies a position of safety, and, in the absence of any warning or reason to believe that the ordinance will be violated, is not guilty of contributory negligence in failing to look up and down the street as he alights, to ascertain whether the ordinance is being violated.[37] The driver of an automobile, however, is not called upon to drive his car so as to protect passengers on street cars who see fit to jump from the cars while they are in motion.[38]

The care of the driver in the proximity of a street car must be exercised, not only for the safety of those leaving or boarding the car, but also for all pedestrians who happen to be in the streets. The presence of a street car increases the danger of pedestrians from whose view approaching automobiles are likely to be hidden. That fact raises still another situation which must be provided for. In such cases the general rules with

[31] Barbour v. Shebor, 177 Ala. 304, 58 So. 276.

[32] Vesper v. Lavender, — Tex. Civ. App. —, 149 S. W. 377.

[33] Harder v. Matthews, 67 Wash. 487, 121 Pac. 983.

[34] Michalsky v. Putney, 51 Pa. Super. Ct. 163; Bongner v. Ziegenhein, 165 Mo. App. 328, 147 S. W. 182.

[35] Kauffman v. Nelson, 225 Pa. 175, 73 Atl. 1105.

[36] Liebrecht v. Crandall, 110 Minn. 454, 126 N. W. 69.

[37] Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078.

[38] Brown v. Brashear, 22 Cal. App. 135, 133 Pac. 505.

respect to the reciprocal rights of the driver and pedestrian control. It has been held[39] that the driver of an automobile is guilty of gross negligence in driving his car at a high rate of speed across the intersection of two much-traveled streets and around the end of a street car which obstructs his view of the crossing so that, upon finding a pedestrian directly in the path of his car, he cannot, by any sort of diligence, stop his automobile in time to avoid a collision with him.

In an emergency a pedestrian is not held to the same standard of care as he is under ordinary conditions. For where, for example, he has no notice of the approach of an automobile until the flash of its light strikes his eyes, and he suddenly finds himself in a place of peril, he cannot be expected to act with the deliberate judgment of a man under no apprehension of danger, persons in positions of great danger not, as a rule, being held to exercise all the presence of mind and care of a prudent and careful man.[40] And a pedestrian who, without fault of his own, is placed in a perilous position by the negligence of a driver, cannot be held to the same degree of deliberation and coolness as he is bound to exercise under ordinary circumstances.[41] Thus, where a pedestrian passes safely in front of a street car, and is confronted by an automobile running at an unlawful rate of speed, and is placed in a situation of unusual peril, he is not chargeable with contributory negligence in attempting to pass in front of the automobile, if he has reasonable grounds for believing that such course would be the safest; and he is not chargeable with the consequences of error of judgment resulting from the excitement and confusion of the moment.[42]

One of the common operations of an automobile is towing or being towed. The act of towing a disabled automobile through the streets by means of a rope is not negligence,[43] and one who is injured by tripping over the rope between the automobiles cannot recover without proof of other acts on the part of the drivers constituting negligence. And even where the one who is steering a disabled machine consents that a pedestrian may cross between the two machines while they are standing still, the granting of such permission does not constitute negligence unless he has reason to believe that the chauffeur of the forward machine is about to start.[44]

There is a law of the road arising from usage and custom, which requires persons traveling upon a continuously used street to keep upon the right side of such way.[45] However, one may lawfully use the left side of the road, if there is no travel at that time upon that part of the way, or if the travel is not so heavy as to make his conduct a source of danger.[45] But one so driving on the left side of the street must always exercise a degree of care commensurate with his position, and that is usually a higher degree of care than that required of him while on the right side of the street.[45] Where the law of the road is statutory, pedestrians lawfully using a public way have a right to presume that drivers of automobiles will act in conformity with the law of the road as laid down by the statutes;[46] and if a driver of an automobile neglects to obey such law, and injury results, his failure to comply with the statute is a circumstance which the jury may consider in determining whether he was careless, and, unless explained, is indicative of negligence.[46] Where, however, the circumstances are such that, in the exercise of reasonable care, the statute cannot be literally obeyed which requires a vehicle to drive to the left in passing another vehicle which it has overtaken going in the same direction, no inference of negligence can be drawn from

[39] Gregory v. Slaughter, 124 Ky. 345, 124 Am. St. Rep. 402, 99 S. W. 247, 8 L.R.A.(N.S.) 1228.

[40] Kessler v. Washburn, 157 Ill. App. 532.

[41] Dougherty v. Davis, 51 Pa. Super. Ct. 229.

[42] Citizens' Motor Car Co. v. Hamilton, 32 Ohio C. C. 407, affirmed in 83 Ohio St. 450, 94 N. E. 1103.

[43] Canfield v. New York Transp. Co. 128 App. Div. 450, 112 N. Y. Supp. 854.

[44] Titus v. Tangeman, 116 App. Div. 487, 101 N. Y. Supp. 1000.

[45] Segerstrom v. Lawrence, 64 Wash. 245, 116 Pac. 876.

[46] Foster v. Curtis, 213 Mass. 79, 99 N. E. 961, Ann. Cas. 1913E, 1116, 42 L.R.A.(N.S.) 1188.

a failure to drive to the left.[46] And it has been held that this rule of the road with respect to passing an overtaken vehicle on the left may not be invoked in behalf of one who has ceased to be a passenger on the street car which the automobile is passing on the wrong side.[47]

It will be seen that there is scarcely less uniformity with respect to the application of the general principles than exists with respect to the general principles themselves. This is a source of gratification when one considers the confusion and doubt attendant upon the working out of general rules of law in the past and the divergent lines of authority which have frequently resulted therefrom. Numerous as are the situations to which the courts have been compelled to apply the general principles which they have enunciated, the rapid increase in the number of automobiles is causing the number of cases dealing with the question under consideration to multiply at such a rate that at present few phases of the question remain concerning which the law is in doubt. With the present prospects for a continued increase in the use of automobiles, and the chances that there will be no decrease in the number of careless pedestrians and reckless drivers, it is safe to prophesy that the time will be short until the law governing the reciprocal duties of pedestrians and automobilists will practically attain the certainty of statutory law.

Ernest L. Davis.

[47] Marsh v. Boyden, 33 R. I. 519, 82 Atl. 393, 2 N. C. C. A. 410, 40 L.R.A.(N.S.) 582.

Motor Regulations in Japan

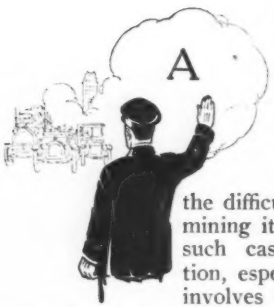
The regulations for motor traffic in Japan are neither long nor complicated. In case of a vehicle being in the street in an unsafe state it is the duty of the police to order it to stop or to allow it to proceed only after defects have been remedied.

Speed is limited to eight miles an hour save in Yokohama, where the speed limit is six miles. Motors must not race. When cars meet they must slow down. When a motor meets a procession, a funeral or fire engines proceeding to a fire it must pull up and take another route. Violation of these rules will be followed by fine or imprisonment. The regulations are not quite so Draconic as they appear, for the Japanese streets are very narrow and abound in picturesque and capricious turnings.—London Globe.

Evidence as to Speed of Automobile

BY WILLIS A. ESTRICH

of the Ohio Bar



ANY one who has seen a passing automobile must, if he has thought on the matter, realize the difficulty of determining its speed from such casual observation, especially if that involves a determination between speeds closely approaching each other. Was it going at 8 miles per hour, or 10? was it 16 or 20? The cases show that there is difficulty in determining even between extremes in speed,[1] and the difficulty is increased in determining between speeds that approximate each other.

It is the close case, however, that requires evidence, and this must usually be that of observers of the car, rather than occupants thereof. The owner of the car, who may be boastful among his friends, of the wonderful speed of which his new car is capable, and the short time he required in going to his summer home or coming into the city, is never quite so sure when haled into court for exceeding the speed limit, or running over Farmer Dobson's chickens, or frightening Farmer Smith's family horse, that the new car was going so fast after all. In fact, he observed the speedometer about this time, and it was registering 8 miles per hour, and just now he does not think that the speedometer registered more than 10 miles per hour at any time in the entire trip. The testimony of Farmer Dobson and Farmer Smith, on the other hand, corroborates the speed capabilities of the new car as confided by the owner to his companions in the quiet of his club. Such is the fallibility of human nature. On such evidence, however, it must be decided what the speed of the car really was, at least for the purpose of determining the case.

Witness as to Speed Need Not Be Expert.

It is well established that witnesses who have ordinary ability and means of observation, or who have observed passing automobiles frequently, may testify as to speed.[2]

An objection to the testimony of a witness who had observed the automobile

[1] In State v. Watson, 216 Mo. 420, 115 S. W. 1011, the driver of the car testified that he was running about 10 miles per hour at the time in question. Another witness testified that the automobile was running 40 miles per hour, and still another put the speed at from 40 to 50 miles per hour.

In Hough v. St. Louis Car Co. 146 Mo. App. 58, 123 S. W. 83, some witnesses estimated the speed of the automobile at not to exceed 8 miles per hour,—others at from 15 to 20.

[2] Matla v. Rapid Motor Vehicle Co. 160 Mich. 639, 125 N. W. 708; Miller v. Jenness, 84 Kan. 608, 114 Pac. 1052, 34 L.R.A.(N.S.) 782; Neidy v. Littlejohn, 146 Iowa, 355, 125 N. W. 198 (witness stated to have some competency); Johnson v. Coey, 142 Ill. App. 147, affirmed in 237 Ill. 88, 86 N. E. 678, 21 L.R.A.(N.S.) 81; Zoltovski v. Gzella, 159 Mich. 620, 134 Am. St. Rep. 752, 124 N. W. 527, 26 L.R.A.(N.S.) 435; Hough v. St. Louis Car Co. 146 Mo. App. 58, 123 S. W. 83 (one witness was a motorman on a street car, and was accustomed to noticing speed of vehicles, other witnesses, whose qualifications do not appear, testified also); Dugan v. Arthurs, 230 Pa. 299, 79 Atl. 626, 34 L.R.A. (N.S.) 778.

In Porter v. Buckley, 78 C. C. A. 138, 147 Fed. 140, it was said that if proof that the witness had previously observed the speed of moving objects was necessary, that proof was furnished by showing that witnesses had witnessed horse races and had timed express trains.

in question pass at about the time of the accident, as to the speed of the automobile, on the ground that it should be first shown that the witness was qualified to answer the question by reasonable experience in judging speed, was overruled, and the witness answered: "I have said to myself he was going 15 miles an hour. . . . I think he was going twice at fast as you would drive a horse." On the question as to the qualification of a witness the court states that "generally an adult person of reasonable intelligence and ordinary experience in life, who just before an accident observed the passing automobile, the rapid speed of which is claimed to have caused the accident, is presumably capable, without proof of further qualification, of expressing an opinion as to how fast such automobile was going."[3]

So a woman and another with her, who were in a vehicle which was wrecked through the frightening, at an automobile, of a horse hitched thereto, were allowed to testify that the automobile was coming at high rate of speed, faster than street cars which make 10 miles in 40 minutes. It is stated that they were not called as expert witnesses, but were eye witnesses of a fact, and that they undertook to convey to the jury the picture made on their minds, at the time, of something transpiring before their eyes.[4]

It has been stated that an intelligent person having a knowledge of time and distance is capable of forming an opinion as to the speed of a passing railroad train, a street car, or an automobile.[5]

Absolute accuracy as to the speed of an automobile is not required in judicial proceedings in which the fact is pertinent. This is given as a reason for admitting the testimony of nonexpert witnesses. It is stated that the necessities of the case require that such testimony be admitted in trials involving the wanton and dangerous speeding of automobiles. To hold otherwise, and compel the production of expert testimony in such cases would, in almost every instance, defeat the ends of justice.[6]

To permit only experts to testify as to the speed of an automobile has been declared wholly impracticable.[7]

Probably no person can stand and look at a moving vehicle of any kind, and tell the exact rate of speed at which it is moving; but any intelligent person who has given attention thereto can give a reasonably accurate estimate of the rate of speed.[8]

Manner of Giving Evidence.

The evidence as to speed need not estimate in number of miles per hour. Testimony that the automobile "was going very fast," that "it seemed to me to be going mighty fast," has been admitted.[9]

So the estimate has been that the automobile was going twice as fast as you would drive a horse.[10] Or that it was going "a good deal faster than a horse trots."[11]

In other cases the estimate has been in number of miles per hour.[12] That the automobile was going "at the rate of 40 or 50 miles per hour as the express goes through town," has also been the form in which testimony as to speed has been given,[13] or that it exceeded a stated number of miles per hour.[14] It has been stated that the speed was faster than street cars which make 10 miles in 40 minutes.[15]

Witness Must Have Had an Opportunity of Observing.

There must have been some opportunity, on the part of the witness, of ob-

[3] Wolfe v. Ives, 83 Conn. 174, 76 Atl. 526, 19 Ann. Cas. 752.
[4] Shaffer v. Coleman, 35 Pa. Super. Ct. 386.
[5] Dugan v. Arthurs, 230 Pa. 299, 79 Atl. 626, 34 L.R.A.(N.S.) 778.
[6] Ibid.
[7] State v. Watson, 216 Mo. 420, 115 S. W. 1011.
[8] Miller v. Jenness, 84 Kan. 608, 114 Pac. 1052, 34 L.R.A.(N.S.) 782.
[9] Johnson v. Coey, 142 Ill. App. 147, affirmed on other grounds in 237 Ill. 88, 86 N. E. 678, 21 L.R.A.(N.S.) 81.
[10] Wolfe v. Ives, supra.
[11] Zoltovski v. Gzella, 159 Mich. 620, 134 Am. St. Rep. 752, 124 N. W. 527, 26 L.R.A. (N.S.) 435.
[12] Wolfe v. Ives, supra; Hough v. St. Louis Car Co. 146 Mo. App. 58, 123 S. W. 83.
[13] Porter v. Buckley, 78 C. C. A. 138, 147 Fed. 140.
[14] Matla v. Rapid Motor Vehicle Co. 160 Mich. 639, 125 N. W. 708.
[15] Shaffer v. Coleman, supra.

serving the automobile. One who was driving a vehicle which was struck by an automobile, and who saw the automobile approaching for some distance, and who witnessed automobiles go by his place frequently, and had ridden in them, was held competent to testify as to speed.[16]

But one who was riding in a vehicle after dark, and who testified that the automobile was but 20 feet from the horse's head when first discovered, was held not to have been in a position to judge of the speed, although he testified further that the automobile made no noise when approaching and that when running at a high rate of speed it made but little noise, and when running at a low speed it made much more noise.[17]

[16] Matla v. Rapid Motor Vehicle Co. supra.
[17] Wright v. Crane, 142 Mich. 508, 106 N. W. 71, 19 Am. Neg. Rep. 336.

The question as to the speed of the automobile being one of fact, the ultimate decision thereof is for the tribunal which determines questions of fact under the rules applicable thereto. Until a better method shall have been discovered than that of basing such decisions upon the testimony of ordinary witnesses who have observed the speed of the automobile in question, it will be necessary to adhere to this method. It cannot be said, however, that the present method has utterly failed, although some erroneous conclusions may have been reached under it.

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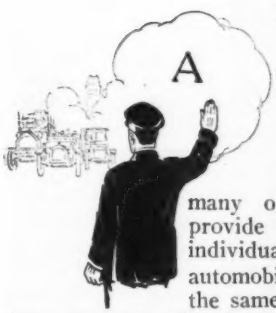
Operating Automobile Without License

BY C. P. BERRY

Of the St. Louis Bar

Author of Treatise on "Automobile Law"



A LICENSE is authority to do that which without the license is unlawful. Statutes in many of the states provide for licensing individuals to operate automobiles, and at the same time require that all automobiles be registered with designated officials, and that a distinctive number be issued to the owner, who is required to display the same on the machine so registered. A compliance with the law in this respect constitutes a license to operate that automobile on the public highways. It is, in all cases of police regulation, the statute, or ordinance, as the case may be, and a compliance with its terms, that constitute a license to do the thing otherwise thereby forbidden. The slip of paper, or so-called license, generally issued to those complying with the statute, is merely evidence that the person to whom it is issued has complied with the law and is therefore licensed to do the thing in question.

In violating a statute of this character, a man does an unlawful act, for which the statute usually prescribes a penalty. But it has generally been held that in doing an unlawful act a person does not put himself outside the protection of the law. Ordinarily he is not barred of redress for an injury suffered by himself, nor liable for an injury suffered by another, merely because he is a lawbreaker. In actions to recover for injuries due to negligence, the fact that the plaintiff or defendant at the time of the injury was a lawbreaker may be relevant as an incidental circumstance, but is otherwise generally considered as immaterial, unless the act of violating the law is in itself a breach of duty to the party injured in respect to the injury suffered.

It is a rule of law that when the purpose of a statute is the protection of individuals, one who violates it is liable, to those for whose protection it was intended, for injuries directly resulting from such violation.[1]

It may be inferred, therefore, that those courts holding that one operating an automobile without having registered the same as required by statute is a trespasser upon the highway base their decision upon the theory that such statutory provision creates a duty in such person to other travelers, and that the duty created thereby is not merely a public one, to be enforced by the penalties prescribed by the statute.

Unregistered Car.

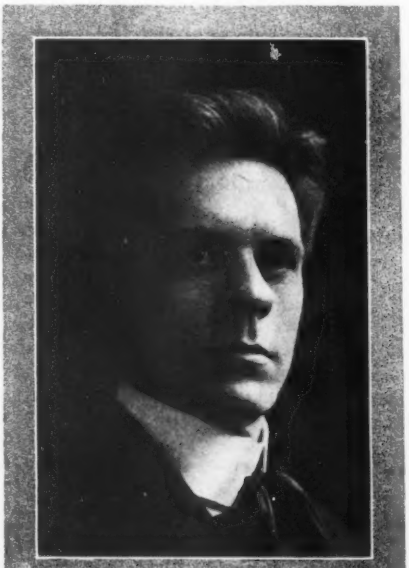
The operation of an unregistered automobile upon the public highways in violation of a statute requiring all automobiles to be registered before they shall be so operated is held in Massachusetts to convert the operator into a trespasser upon the highways, to whom other travelers owe the duty only of refraining from injuring wilfully or wantonly.[2] Such automobile is said to be unlawfully

[1] Schaar v. Comforth (1915) — Minn. —, 151 N. W. 275.

[2] Holden v. McGillicuddy, 215 Mass. 563, 102 N. E. 923; Holland v. Boston, 213 Mass. 560, 100 N. E. 1009; Love v. Worcester Consol. Street R. Co. 213 Mass. 137, 99 N. E. 960.

on the highway, and its driver is denied the right to recover for injuries inflicted by another user of the highway, although the accident would not have occurred but for the negligence of such other person.[3]

"We cannot avoid the conclusion," said the Massachusetts court, "that it was intended to safeguard persons who were lawfully using the highways from the serious risks of injury by machines of this character which were operated in defiance of the law, and the owners of which furnished no means by which they could be identified and compelled to make proper compensation for injuries which by their violation of law or by their mere negligence they might cause to other travelers. The legislature, in the opinion of a majority of the court, intended to outlaw unregistered machines, and to give them, as to persons lawfully using the highways, no other rights than that of being exempt from reckless, wanton, or wilful injury."[4]



C. P. BERRY

In actions by the occupants of an automobile to recover for injuries suffered in a collision with a train, and in which it appeared that the automobile was not registered, the court said: "Under the decisions, the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. In going along the way and entering upon the crossing, the machine is an outlaw. The operator, in running it there and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law, and which directly contributes to the injury by bringing the machine into collision with the engine. He is in no better condition to recover than a person would be who was violating the law by walking on the track of a railroad, and was struck by an engine when he had reached the crossing of a highway."[5] This rule is applied alike to the operator of an unregistered automobile and the occupants thereof.[6] And it is held to be immaterial that the occupants were ignorant of the fact that the machine was not registered.[7] However, the contrary view has been taken in some states. Even in a state in which the statute forbids the operation of automobiles on the highways unless they have been registered, which may be thought to be stronger than a statutory requirement that they be registered, it has been held that the fact that one was operating an unregistered car when he was injured by the negligence of another user of the highway does not bar his

[3] Crompton v. Williams, 216 Mass. 184, 103 N. E. 298.

[4] Dudley v. Northampton Street R. Co. 202 Mass. 443, 89 N. E. 25, 23 L.R.A.(N.S.) 561.

[5] Chase v. New York C. & H. R. R. Co. 208 Mass. 137, 94 N. E. 377.

[6] Chase v. New York C. & H. R. R. Co. supra; Dean v. Boston Elev. R. Co. 217 Mass. 495, 105 N. E. 616.

[7] Feeley v. Melrose, 205 Mass. 329, 91 N. E. 306, 137 Am. St. Rep. 445, 27 L.R.A. (N.S.) 1156.

right to recover therefor, nor render him a trespasser to whom such other user owed the duty merely to refrain from injuring wilfully or wantonly.[8]

It was held, in the case last cited, that the violation of the statute is not a proximate cause of the injury to the person violating it. Further, the court said: "There was no relation of cause and effect between the unlawful act and the collision. The registration of plaintiff's automobile was of no consequence to defendant. The law providing for such registration was not for the prevention of collisions, and had no tendency to prevent collisions."

In an action by the owner of an automobile to recover damages against a railroad company for injuries resulting to his machine when it was negligently struck by a train, the defendant set up the fact that the plaintiff had not caused the automobile to be registered as required by statute. In this respect the court said: "While the operation of an unregistered motor vehicle upon the public highways of the state is made unlawful, the statute does not provide that a failure to comply with its provisions will deprive the owner of a motor vehicle of a right to recover damages for an injury to an unlicensed vehicle caused by the negligence of another, and it does not modify the statutory provisions relative to the liability of railroad companies for negligent injuries to others. . . . In doing an unlawful act a person is not denied the rights and protection accorded by law. If a person's unlawful act contributes proximately to his own injury, he may not recover damages of another for a negligent participation in that injury; but if an unlawful act of an injured party has no causal relation to his injury that proximately results from another's mere negligence, a recovery may be had under the principles of the common law, if the plaintiff is not guilty of contributory negligence."[9]

Where the rider of a motorcycle was injured by negligence of the driver of an automobile in operating his car at a rate of speed in excess of that permitted by law, it was held to be no defense that the motorcycle was not registered as required by statute.[10]

In this instance both plaintiff and defendant were violating the law, but the court took the view that it would not have altered the question had the injury been due to negligence not in conflict with the regulations in question.

In Connecticut it has been held that the fact that plaintiff's automobile, in which he was riding when injured by the defective condition of the street, was not registered as required by statute, did not make of him a trespasser, nor prevent his recovery for such injuries, although a violation of the statute in this respect was punishable by fine or imprisonment.[11]

The statute in question, however, while it required automobiles to be registered, and provided a penalty for failure to comply therewith, did not expressly prohibit the operation of unregistered machines on the highways.

In a New York case it was declared that there is nothing in such a statute to indicate that it was intended to afford greater protection to the public.[12]

In Alabama it is declared that the fact that a person was operating an unregistered automobile on a public highway when he was injured by another's negligence is immaterial in an action by him to recover for such injury.[13]

It has even been held, in an action to recover for injuries due to the defendant's negligent operation of his automobile, that it was error to instruct the jury that they might consider defendant's failure to register his car, in violation of statute, as prima facie proof of negligence.[14]

[8] Armstead v. Lounsberry (1915) — Minn. —, 151 N. W. 542, L.R.A.1915D, —.

[9] Atlantic Coast Line R. Co. v. Weir, 63 Fla. 69, 58 So. 641, Ann. Cas. 1914A, 126, 41 L.R.A.(N.S.) 307.

[10] Shimoda v. Bundy, 24 Cal. App. 675, 142 Pac. 109.

[11] Hemming v. New Haven, 82 Conn. 661, 74 Atl. 892, 18 Ann. Cas. 240, 25 L.R.A.(N.S.) 734.

[12] Hyde v. McCreery, 145 App. Div. 729, 130 N. Y. Supp. 269.

[13] Stovall v. Corey Highlands Land Co. (1914) — Ala. —, 66 So. 577; Armstrong v. Sellers, 182 Ala. 582, 62 So. 28.

[14] Hyde v. McCreery, 145 App. Div. 729, 130 N. Y. Supp. 269.

Unlicensed Operator.

The failure of an automobile operator to secure a license authorizing him to operate such vehicle reflects upon his personal fitness for such position, and his skill in the actual management of the car. Accordingly, it may logically be contended, such omission on his part is some evidence of negligence.

It is very generally held, however, that the fact that one was operating an automobile without a license to do so, in violation of a statute, does not lessen the duty owed him by other users of the highways, nor render him a trespasser thereon.[15]

Such conduct, it is said in some cases, is merely evidence of negligence on his part in the operation of his machine, to be considered by the jury in connection with the other evidence, if any, bearing on that question.[16]

"We think," said the court in one case, "that the operation of a car without a license, while it is a punishable act, does not render the operator a trespasser on the highway, but that the illegal element in the act is only the failure to have a license while operating it, so that if the operation and movement contributed to the accident with which the want of a license had no connection, except as a mere condition, they would not preclude the operator as a plaintiff from recovery." [17]

Consequently an occupant of an automobile, which was being operated without a license, in violation of a statutory requirement, may recover for an injury due to the negligence of a street car motorman in causing a collision between the street car and the automobile.[18]

In Washington it is held that the rider of a motorcycle is not precluded from recovery for injuries due to the negligence of the operator of an automobile, by the fact that he was operating the cycle on the public highway without having procured a license as required by statute. This was placed on the ground that there was no causal connection between the failure to secure the license and the act complained of; that in this instance the injury would have happened in the same manner had the plaintiff theretofore paid the license fee due the state and been in possession of the statutory license. This conclusion was reached because the plaintiff had violated a mere "revenue portion" of the statute. "Had the respondent violated some part of the regulative part of the statute, and his injury had resulted therefrom, unquestionably he could not recover, regardless of the negligence of the appellants, as long as such negligence was not wanton.[19]

It has been held that a person employing an unlicensed owner of an automobile, who kept the same for hire, to convey him on the public highways, where a statute provided that "no person shall employ for hire as a chauffeur or operator of a motor vehicle any person not specially licensed," is not a trespasser on the highways, but that such facts constitute evidence of negligence on his part.[20]

So, too, the fact that the badge of the chauffeur was not in sight, as required by statute, will not defeat recovery for damage to the automobile, due to the negligence of another.[21]

Some courts go further, and hold that the operation of an automobile by an unlicensed person, in violation of statutory requirement, is negligence *per se*. Recovery is denied, however, where there is no actual connection between the failure to secure such license and the injury to the person bringing the action.[22]

[15] Armstrong v. Sellers, 182 Ala. 582, 62 So. 28; Anderson v. Sterrit (1915) — Kan. —, 148 Pac. 635; Holden v. McGillicuddy, 215 Mass. 563, 102 N. E. 923; Bourne v. Whitman, 209 Mass. 155, 95 N. E. 404, 2 N. C. C. A. 318, 35 L.R.A.(N.S.) 701.

[16] Holden v. McGillicuddy, 215 Mass. 563, 102 N. E. 923; Holland v. Boston, 213 Mass. 560, 100 N. E. 1009.

[17] Bourne v. Whitman, 209 Mass. 155, 95 N. E. 404, 2 N. C. C. A. 318, 35 L.R.A.(N.S.) 701.

[18] Porter v. Jacksonville Electric Co. 64 Fla. 409, 60 So. 188.

[19] Switzer v. Sherwood, 80 Wash. 19, 141 Pac. 181.

[20] Conroy v. Mather, 217 Mass. 91, 104 N. E. 487, 52 L.R.A.(N.S.) 801.

[21] Latham v. Cleveland, C. C. & St. L. R. Co. 164 Ill. App. 559.

[22] Lindsay v. Cecchi, 3 Boyce (Del.) 133, 80 Atl. 523, 1 N. C. C. A. 88, 35 L.R.A.(N.S.) 699.

Burden of Proof.

The burden of proving that an automobile is not licensed or registered as required by statute is on the defendant, in actions brought by occupants of automobiles to recover for injuries due to the negligence of others.[23]

It is consequently unnecessary, in an action to recover for injuries due to the common-law negligence of the operator of an automobile, to allege that the machine was registered as required by statute.[24]

So, in an action to recover for damages to an automobile, the fact that the plaintiff did not prove that he had a state license to operate the machine, as required by statute, was no ground for nonsuit.[25]

While, if it affirmatively appears that a traveler is using the highway in violation of the statute he cannot recover for an injury due to a defect in the highway, and other travelers owe him the duty required of all persons to trespassers, yet if there is no proof of a violation of the law by him, he must be presumed to be innocent thereof, and to have been using the highway lawfully, because it is a well-settled rule that presumptions, both of law and fact, are always in favor of innocence.[26]

[23] Dean v. Boston Elev. R. Co. 217 Mass. 495, 105 N. E. 616; Conroy v. Mather, 217 Mass. 91, 104 N. E. 487, 52 L.R.A.(N.S.) 801.
[24] McNeil v. Webeking, 66 Fla. 407, 63 So. 728.
[25] Shaw v. Thielbahr, 82 N. J. L. 23, 81 Atl. 497.
[26] Conroy v. Mather, 217 Mass. 91, 104 N. E. 487, 52 L.R.A.(N.S.) 801; Doherty v. Ayer, 197 Mass. 241, 125 Am. St. Rep. 355, 83 N. E. 677, 14 L.R.A.(N.S.) 816.

A Highway With a Personality

I am the product of centuries, the realization of a thousand dreams, the culmination of ten thousand efforts, the work of a million hands.

I stand for progress, I represent human advancement, I typify civilization. Were it not for what I express, mankind would revert to barbarism.

All the longing and striving of ages is summed up in me. I am the result of a fundamental need; the savage sought me and yet the highest civilization cannot do without me.

I am a product of the past, an ideal of the present, the ambition of the future. I am an evolution; my past no man can trace; my future no imagination can picture.

An ocean of blood has been shed along my course, that I might come into being; my desert silences have heard the dying prayer of thousands of my progenitors. I have culled from the advancing hosts of a nation in the making the worthless chaff of the unsound and inferior.

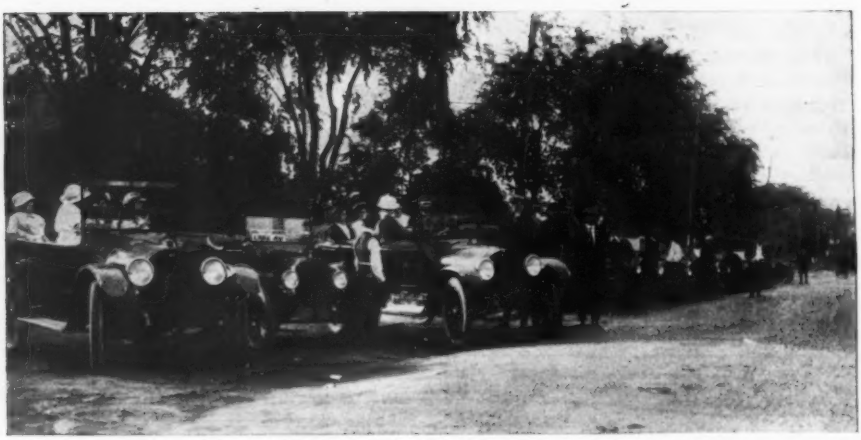
The icy gullies of my mountain passes and the withering heat of my western deserts have tried men's souls and bodies, but those who conquered me have found a nation and a home and I am the servant of my conquerors.

I carry the burdens of a continent; I distribute the fruits of its fertile fields and abundant valleys and the products of its countless industries. I represent the unity of the nation that bore me and I promote the welfare and happiness of its inhabitants. I aid the education of its youth, the intermingling of its teeming population, the better understanding of its widely separated sections.

I unite the oceans; I connect twelve great sovereign commonwealths; I am the backbone road of the Republic, the inspiration for a million miles of interconnecting branches.

Into me has been breathed the personality of twentieth century America. I am worthy of my namesake—like him, I am the product of adversity—the ideal of a new race.

I am the Lincoln Highway.—Austin F. Bement.



JITNEYS WAITING TO TRANSPORT EMPLOYEES OF EASTMAN KODAK CO., ROCHESTER, N. Y.

The Jitney Bus as a Factor in Public Service

BY E. GORDON LEE

of the New York Bar

IN VIEW of the public interest which has been aroused throughout the country by reason of the operation of jitney busses in various communities, and the prominence given to this method of transportation in the public press, much speculation has arisen with regard to the status of the jitney as a factor in public service.

The jitney bus originated in the West. The term is applied to any automobile or mechanically driven bus carrying passengers for a five-cent fare. The word "jitney" in western parlance is equivalent to our eastern nickle. The expression is said to be a corruption of a Japanese term for a small coin of such little value that it is usually spoken of with great contempt. Others believe the word to be of negro origin, and assert that in the old days of the Mississippi steamboats the dock roustabouts were wont to refer to a nickle as a jitney. Another account avers that a penitentiary trusty named Jedney used to smuggle tobacco, sugar, and other supplies to the prisoners, giving them five cents' worth for ten cents, thus resulting in a nickle profit to himself, the transaction being obscurely referred to as a jitney.

It is claimed that the first jitney bus appeared in Oakland, California, when a second-hand automobile stopped at the curb bearing the placard, "Will take you anywhere, will stop anywhere, for one jitney." About a year ago, one L. R. Draper, a citizen of Los Angeles, started a business of this kind in that city, and

many regard him as the originator of the idea. Be that as it may, California is certainly responsible for setting up the most rapid disturbance in city transportation this country has ever seen.

It took several months for the new method of transportation to attain much popularity. But the city of Los Angeles, since November, 1914, has led other large communities in the number of jitney busses operating within its limits. Since that time the business has been undertaken in various places with varying results,—affording problems alike to the existing carriers and the public authorities.

Information obtained from mayors, bankers, and railway authorities in various municipalities discloses that out of 138 cities representing 45 states, the District of Columbia, and 8 of the principal cities of the Dominion of Canada, jitney busses are operated at present in 106, leaving 32 in which there is no traffic of this character. Of the 106 cities in which the jitney bus lines are established, 10 report that the number of jitneys in operation is decreasing, and of the 32 cities reporting no jitney service, 7 advise that the "jitneys" appeared, but were discontinued, either because they proved unprofitable or by reason of unfavorable public sentiment, reflected in ordinances for their regulation or extinction.

In true American fashion, this new industry has been welcomed as an opportunity to set up a permanent and growing business on one's own behalf. The reaction in business that affected the whole country throughout 1914 was quite pronounced on the Pacific Coast. Many men who were out of employment or dissatisfied with their positions entered this new field, which offered steady employment with greater freedom and opportunity.

It is not difficult to appreciate the allurement of such prospects. While conditions vary in every community, the jitney has prospered marvelously well, all things considered, but it is obvious that those localities having a mild climate, well-paved streets, few hills, many cheap second-hand automobiles, and a number of people lacking regular employment, will be the ones in which the traffic is apt to flourish,—subject, of course, to the restrictions imposed by local regulating bodies.

That the jitney is here to stay is indicated by the action of some of the large eastern trolley companies, which have taken the radical stand that if the trolley companies are to save themselves from extinction by the jitney busses, —which are now rapidly making inroads upon the revenue of the electric lines throughout the country,—the traction interests must organize a jitney service of their own.

James E. Hewes, General Manager of the Albany Southern Railroad Company, in a paper read before the 23d annual meeting of the New York Electric Railway Association, pointed out the desirability of the street railways forestalling, by the invention and operation of satisfactory motor vehicles, the entry of organized capital into this field.

The view of the street railway companies seems to be that the jitney bus is more than a temporary institution; that the service it renders is good compared with the street railways; that it will continue to grow and become a serious competitor if it attracts capital to its aid; and that the best way to meet that competition is to establish the jitney as an auxiliary to their present service. If used in this capacity, it would prevent the jitneys from taking away the railway's short-haul traffic along the congested routes, which is its most profitable business. Usually the jitney follows the street-car route, picking up passengers who would necessarily take a trolley if there were no jitneys; and the argument on the part of the street railways that the jitney takes the profitable short-haul passengers, and leaves the trolley to carry the unprofitable long-haul ones, is forceful, and undoubtedly has had great influence with various regulative bodies in the cities where jitneys are now operating.

The jitney-men say that they welcome regulation as long as it does not prevent their obtaining a reasonable return on the amount they have invested in the enterprise, their own labor included.

Municipal regulations of the business

usually prescribe a license fee graduated according to passenger capacity, and require a bond to be given to insure careful and proper operation, and to afford indemnity for damages inflicted. Some cities require that patrons shall be carried on fixed seats, and provide for periodical inspection of the cars. Hours, routes, and schedules are sometimes required to be designated. Several municipalities require jitney drivers to keep to their designated routes on penalty of losing their licenses. A few cities require the interior of the car to be lighted after sunset.

It is obvious that the single driver cannot in a majority of cases comply with the manifold requirements of municipal ordinances, and there are being formed in the cities where jitneys are now operating, regular jitney associations, which have fine garages where they obtain special rates on their oil and gasolene, and maintain at their expense, and in collaboration with the city authorities, regular jitney traffic officers in uniform, whose duty it is to enforce the city traffic ordinances, as well as the rules of the association, which have primarily in mind the furtherance of public service; and in this regard it would not be out of place to say that the jitney drivers seem to realize, as a whole, the necessity of giving such good service as will win the people to their support.

The spirit of co-operation between the proprietors of jitneys and the city officials is most apparent in those cities where poor service is being rendered at present by the trolley companies.

The attitude of the city of Rochester, New York, is shown in the following recommendation of the committee of the common council which reported a jitney ordinance for adoption: "The state has seen fit to intrust to the city the regulation of jitneys, while the regulation of other transportation systems in the city is vested in a state body,—the Public Service Commission. We feel at liberty, therefore, to make the regulations as to jitneys more stringent than those applicable to the other common carriers in the city. While this ordinance may not be entirely acceptable to the corporations and persons operating vehicles for the transportation of the public in this city, we feel that their interests must at all times give way to the interests of the people of the city, and we are of the opinion that the ordinance presented will tend to promote public safety and convenience, and therefore recommend its adoption."

The ordinance as adopted provided a license fee of $50 for a car carrying five passengers, and of $60 for vehicles carrying five and no more than ten passengers. Cars carrying more must pay $75. All such vehicles are bonded at $3,000 per car for not more than ten passengers, and $5,000 per car for more than ten passengers. An owner operating not more than 100 jitneys is required to give a bond not exceeding $25,000, whereas an association of owners operating more than 500 jitneys may unite in one bond of $50,000.

Further requirements are that patrons shall be carried on fixed seats and at a fare of not more than five cents, and that the car shall be inspected at least once a month under the direction of the Commissioner of Public Safety, who also has authority to designate hours and routes of service. A stringent provision is that, in case a person is injured in a jitney accident, the driver's license shall be summarily suspended until the Commissioner of Public Safety shall reinstate the driver.

It is true that the jitney busses add decidedly to traffic congestion in the busiest streets, but they have a great advantage over the street railways in that they can secure their loads and diverge from the crowded thoroughfares to their point of destination.

In London, Paris and Berlin, all transportation of the public is accomplished by auto busses. Some predict that this method of transportation will supersede the electric street railway cars, just as they replaced the horse cars of but a few years ago.

Presumably, the jitney increases street accidents, although at present the police records are not kept in such a way as to definitely determine this matter. It is certain, however, that accidents are happening, and the matter of licensing jitneys and drivers suggests a possibility

JITNEY TRAFFIC ON STATE ST., ROCHESTER, N. Y.

of liability on the part of the municipality for injuries caused by reckless driving, in analogy to the doctrine of municipal liability for injuries from obstructions placed in a street under a permit from the city. As shown in the notes to McKim v. Philadelphia, 19 L.R.A. (N.S.) 506, and Tapfer v. Wichita, 49 L.R.A.(N.S.) 844, the city is held responsible for injuries caused either by the negligence of the licensee, of which it had notice, or by licensed obstructions which are intrinsically dangerous, irrespective of actual notice. There is concededly a distinction between fixed obstructions in the street, and the operation of vehicles thereon, which is the principal purpose of streets. But it may be plausibly contended that, and it is predicted that the courts are going to be called to say whether, the turning loose upon the streets of hundreds of licensed operators who, of necessity, are of more or less personal irresponsibility, and under none of the restraints which work upon the chauffeur of a private car, does not tend to place jitneys in the category of intrinsically dangerous instrumentalities. And in answering this question it is necessary to observe that in the brief history of this character of traffic far more people have been killed and injured by jitneys than by street obstructions.

If this question be answered in the negative, there will remain the matter of reckless or careless drivers, and in this respect the cities should be charged with no small duty to insure the public against improper driving. If a city knows that a driver is habitually careless or reckless, there appears to be no ground upon which it can escape responsibility for his acts. Where a license is issued to a habitually careless person, but without actual notice of his propensities in this respect, there is at least room for argument. The same is true of the failure to revoke a license. The question is simply whether due care in the selection of persons to be licensed is the limit of the city's obligation in the matter. Here is a new situation for the application of old principles. The supposed purpose of government to protect its subjects demands that the city be charged with a high duty in this respect. The ancient idea that the king can do no wrong has been nourished in our republic to the end that all governmental agencies shall be exonerated wherever possible. The latter principle will probably prevail in the new situation as it has in

the past, with the result that municipalities will be exonerated from all injuries except those due to habitual recklessness of which it had actual notice.

Much stress is laid upon the danger to public safety occasioned by the jitney bus, but this is a problem which will adjust itself in the course of time. Most of us can recall the days of the safety bicycles, when the papers were full of the "horrible menace to pedestrians" due to "scorchers," and, later, of the perils of "red-devils" and "buzz wagons," when automobiles were first appearing upon the streets. These inventions, designed for our convenience and comfort, have now become a part of daily existence to such an extent that they are taken as a matter of course. We shall make room in the same way for the jitney bus, if it is allowed to survive.

There are several problems which arise in regard to the matter of control. Successful public control of utilities service is now generally recognized to mean regulated monopoly, and competition is only admitted as a last resort where the utility has failed in its clear duties and responsibilities. This is the argument of the Public Service Companies, who claim that the commissions and municipalities will be unable to enforce adequate regulation or secure satisfactory transportation service while free jitney competition is permitted. Such competition, if allowed, they say must result in decreased railway earnings, and, consequently, the cities will lose much of the income which they now receive from the street railways in the form of taxes upon earnings, franchises, percentage of revenue, paving costs, etc. Furthermore, they claim that street railway franchises will also, in many cases, have to be recast on a basis less favorable to the municipalities and to the public, if unregulated competition is allowed. In answer to this, it is urged that the jitneys desire reasonable regulation.

It is true that city traction companies pay large sums annually in taxes, and are required to bid for franchises by law, which in turn are included in their valuations as a tangible asset; but is it right to urge the suppression of the jitneys because of these taxes and what these taxes are doing for the municipalities? It certainly is wrong in principle to tax street railway companies at a greater rate than the jitneys; but the controlling consideration in allowing a street railway company to come into existence, or jitneys to be operated, should be the rendition of public service. The franchise granted to the street railway company or the license granted to the jitney to operate, is not in the strict sense of the word a property, *i. e.*, property forming a true source of taxation. Its prime object is to enhance the comfort and convenience of the community by affording it better service.

The first requisite of a desirable franchise is an assurance that there will be a proper and reasonable return on the amount invested, or else enterprise would not be attracted. It is reasonable to say that a street railway transportation company should receive greater profits than those accruing to an ordinary business, because it is in the nature of a speculation undertaken in a matter accruing to the public advantage. Leaving out the burdens of taxation, and considering public service alone, a service such as the public can reasonably demand in proportion to the patronage given, why not regulate the income of the street railway companies, and require them to put the excess over a reasonable return into additional cars, extension of lines, better tracks, etc., for the convenience and safety of its patrons? When we exact from a transportation company a high percentage of its profits through heavy taxes, we prevent them from doing these things. Nor is the public likely to derive much benefit from these diverted funds. They are apt to result in increased city pay rolls and official extravagance.

In any event and in spite of changing conditions, we must keep ever before us as our goal, an increased public service.

E. Gordon Lee

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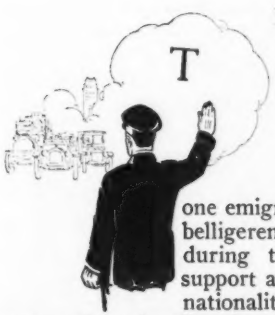
A SHIP WHICH MET THE HIDDEN DEATH.

The effect of a mine upon a steamer is here shown. The hole in the bow is roughly 12 foot square. A total loss was prevented only by the quick beaching of the vessel.

Marine Insurance and War Risks

BY EDWIN S. OAKES

[Ed. Note—This is the second instalment of Mr. Oakes's valuable article, the earlier portion of which appeared in the July Case and Comment.]



THE decisions are conflicting as to whether the status of naturalized citizen acquired by one emigrating from a belligerent country during the war will support a warranty of nationality.[46] A warranty of nationality is violated by a transfer of the vessel insured in trust to secure a debt due to one who is a subject of a belligerent country.[47] But a warranty that a vessel is American property is not falsified by the fact that she is contracted to be sold and transferred at a future day, the seller meanwhile to continue the owner, where such agreement to sell is not a mere cover for belligerent property.[48] It has also been held that the

[46] Affirmative: Duguet v. Rhinelander, 1 Cai. Cas. XXV., 2 Johns. Cas. 476, reversing 1 Johns. Cas. 360. Negative: Jackson v. New York Ins. Co. 2 Johns. Cas. 191.

[47] Murray v. United Ins. Co. 2 Johns. Cas. 168.

[48] Murgatroyd v. Crawford, 3 Dall. 491, 1 L. ed. 692.

neutral character of goods contracted to be sold to a citizen of a belligerent country is not thereby destroyed where no title is to pass until delivery and payment, the vendor undertaking to deliver the goods, taking all risks in transit, provided the agreement is not a mere cover to prevent seizure.[49]

Conversely, it has been held that a warranty of American property was falsified where the property was not to be delivered to the American purchasers unless paid for.[50]

A warranty of nationality is not complied with where the vessel sails without the evidence of nationality required by a treaty with a belligerent,[51] or where the vessel navigates the sea as ostensibly belonging to a subject of a belligerent power.[52]

A vessel may lawfully sail for a blockaded port for the purpose of inquiring as to the continuance of the blockade,[53] and to do so does not violate a warranty of neutrality; but an attempt knowingly to break a blockade is a violation of neutral duty, and not a risk insured.[54] An entry of the port after being warned of the blockade is not, however, a breach of neutrality if the blockading force is not before the port,[55] unless the blockading fleet has been accidentally dispersed and intends to return.[56] An avowal of intention to enter a blockaded port after warning, and while still under detention by the blockading force, is not an attempt to enter it which will falsify a warranty of neutrality.[57]

By a warranty of neutrality the assured engages only that he will not break a blockade, and not that he will bear the loss resulting from the blockade; consequently, such a warranty will not relieve the insurer from liability for a breaking up of the voyage in consequence of a blockade of the port of destination.[58]

It is no breach of a warranty of neutrality for a vessel to carry a passport granted by a government to protect against its own cruisers;[59] nor to keep company with a convoy without, however, receiving or exchanging any signals or receiving any assistance from the convoy, and without altering the vessel's course or retarding its voyage;[60] nor to take convoy, if during the voyage insured the vessel has become exposed to seizure by the other belligerent.[61]

The rescue of a neutral ship from a belligerent while under detention is such a breach of neutrality as will exonerate the underwriters in case of loss;[62] but should the captors put so few men on board that it is manifestly impossible to work the ship, the neutrals are not obliged to subject their property and lives to the mercy of the winds and waves, and may lawfully consider the vessel as abandoned to them, and act accordingly.[63]

The fact that a vessel has been seized on suspicion of a breach of neutrality does not establish such breach so as to exonerate the insurer from liability for capture.[64]

In England the courts, "after much hesitation . . . have held that the sentence of a competent prize court (either of an enemy's or of a neutral, country) is, in actions on a marine policy, conclusive as to the existence of the ground on which the court professes to de-

[49] Ludlow v. Bowne, 1 Johns. 1, 3 Am. Dec. 277; De Wolf v. New York Firemen's Ins. Co. 20 Johns. 214, affirmed in 2 Cow. 56.

Goods so sold are, however, held by prize courts to be subject to condemnation as enemy's property. See The Atlas, 3 C. Rob. 299.

[50] Warder v. Horton, 4 Binn. 529.

[51] Rich v. Parker, 7 T. R. 705, 4 Revised Rep. 552, 14 Eng. Rul. Cas. 149.

[52] Calbreath v. Gracy, 1 Wash. C. C. 219, Fed. Cas. No. 2,296.

[53] Naylor v. Taylor, 9 Barn. & C. 718, 4 Moody & R. 526; Maryland Ins. Co. v. Woods, 6 Cranch, 29, 3 L. ed. 143; Sperry v. Delaware Ins. Co. 2 Wash. C. C. 243, Fed. Cas. No. 13,236.

[54] Vos v. United Ins. Co. 1 Cai. Cas. 7, s. c. 2 Johns. Cas. 469.

[55] Williams v. Smith, 2 Caines, 1, 2 Am. Dec. 209.

[56] Radcliff v. United Ins. Co. 7 Johns. 38.

[57] Fitzsimmons v. Newport Ins. Co. 4 Cranch, 185, 2 L. ed. 591.

[58] Thompson v. Read, 12 Serg. & R. 440.

[59] Jenks v. Hallet, 1 Caines, 60, affirmed in 1 Cai. Cas. 43.

[60] Lawrence v. Ocean Ins. Co. 11 Johns. 241.

[61] Snowden v. Phœnix Ins. Co. 3 Binn. 457.

[62] Garrels v. Kensington, 8 T. R. 230, 4 Revised Rep. 635; Robinson v. Jones, 8 Mass. 536, 5 Am. Dec. 114; M'Lellan v. Maine F. & M. Ins. Co. 12 Mass. 246; Wilcocks v. Union Ins. Co. 2 Binn. 574, 4 Am. Dec. 480.

[63] Wilcocks v. Union Ins. Co. supra.

[64] Smith v. Steinbach, 2 Cai. Cas. 158.

cide." [65] So, where property insured is condemned as contraband, or on the ground of a breach of neutrality, the English courts accept such decree as conclusive evidence of a breach of warranty against contraband or of neutrality.[66]

But in the United States the courts, influenced apparently by the very unfair treatment of neutrals by the belligerents during the Napoleonic wars,[67] have declined to accept the decision of foreign prize courts as conclusive evidence that a cargo contained contraband of war,[68] or as conclusive evidence of a breach of a warranty of neutrality.[69]

Any doubt upon this point is sometimes set at rest by a provision in the policy fixing the place at which proof of compliance with the warranty is to be required.[70]

— of Ownership.

Under certain circumstances a warranty of ownership may be tantamount to a warranty of neutrality. It has been held that a warranty in a policy of insurance that the property is the assured's is falsified by his having concealed papers on board which justly excite suspicion that the property belongs to an enemy of the belligerent making the capture.[71]

Carriage of Contraband of War.

As neutrals are entitled to carry on trade with a belligerent, subject to the opposing belligerent's right of capture, it follows that the carriage of contraband goods, and voyages in breach of blockade, are not illegal and that insurances on such goods or voyages are valid.[72]

The same division of opinion above alluded to has caused it to be held, on the one hand, that where neither vessel nor cargo is warranted neutral, the insurer of cargo is liable for its loss by condemnation as being contraband of war,[73] and, on the other hand, that if goods contraband of war are on cargo the insurer is not responsible for their capture and condemnation on that account unless with full knowledge of the nature of the goods and of the voyage, or by an express undertaking, he has insured them against such capture.[74] The fact that traffic in contraband is notoriously being carried on may, however, be sufficient to relieve the assured from the duty of disclosure.[75]

[65] 17 Laws of England (Halsbury), p. 422.

[66] See Geyer v. Aguilar, 7 T. R. 681, 4 Revised Rep. 543; Baring v. Clagett, 3 Bos. & P. 201, 5 East, 398, 14 Eng. Rul. Cas. 155; Lothian v. Henderson, 3 Bos. & P. 499, 7 Revised Rep. 829; Siffken v. Lee, 2 Bos. & P. N. R. 484, 9 Revised Rep. 676; Hobbs v. Henning, 34 L. J. C. P. N. S. 117, 17 C. B. N. S. 791, 11 Jur. N. S. 223, 12 L. T. N. S. 205, 13 Week. Rep. 431.

[67] The Berlin and Milan decrees of Napoleon declared the British Isles to be in a state of blockade, notwithstanding France did not dare to send a single squadron to sea for fear of capture by the British Navy; while the British Orders in Council of 1806 and 1807 placed in the position of blockaded ports all places from which her commercial flag was excluded. Neutral ships which had touched at British ports, or which had even been visited *en voyage* by British cruisers, were regarded by the French authorities as subject to seizure; and the British accorded similar treatment to vessels bound for a port of France or of her colonies.

And see Geyer v. Aguilar, 7 T. R. 681, where Lord Kenyon speaks of a French prize court as having "proceeded on Algerine (nay on worse) principles; because they professed to proceed according to law, but in reality made the law a stalking-horse for an act of piracy."

[68] Laing v. United Ins. Co. 2 Johns. Cas. 487, reversing 2 Johns. Cas. 174.

[69] Vasse v. Ball, 2 Yeates, 178; Maryland Ins. Co. v. Woods, 6 Cranch, 29, 3 L. ed. 143; Bailey v. South Carolina Ins. Co. 3 Brev. 354; Bourke v. Granberry, Gilmer (Va.) 16, 9 Am. Dec. 589.

[70] See Calbreath v. Gracy, 1 Wash. C. C. 219, Fed. Cas. No. 2,296, where it was held that such a stipulation did not prevent the sentence of the foreign court from being received as evidence on behalf of the underwriter, though not conclusive.

[71] Carrere v. Union Ins. Co. 3 Harr. & J. 324, 5 Am. Dec. 437.

[72] Maryland & P. Ins. Co. v. Bathurst, 5 Gill & J. 159; Richardson v. Maine F. & M. Ins. Co. 6 Mass. 102, 4 Am. Dec. 92; Cook v. Essex F. & M. Ins. Co. 6 Mass. 122; The Santissima Trinidad, 7 Wheat. 283, 5 L. ed. 454; Caine v. Palace Steam Shipping Co. [1907] 1 K. B. 670, 76 L. J. K. B. N. S. 292, 96 L. T. N. S. 410, 23 Times L. R. 203, 12 Com. Cas. 96, 10 Asp. Mar. L. Cas. 380, 7 Ann. Cas. 343, (per Farwell, Id. J.).

[73] Baltimore Ins. Co. v. Taylor, 3 Harr. & J. 198; Seton v. Low, 1 Johns. Cas. 1; Skidmore v. Desdoity, 2 Johns. Cas. 77.

[74] Richardson v. Maine F. & M. Ins. Co. 6 Mass. 102, 4 Am. Dec. 92.

[75] Maryland & P. Ins. Co. v. Bathurst, 5 Gill & J. 159.

Insurance on other goods is not invalidated by the carriage of contraband, since contraband goods found on board a ship are alone liable to confiscation, while innocent goods are not affected unless they belong to the same owner.[76]

The carriage of contraband goods may, however, be invalid where trade in contraband is prohibited by the laws of the neutral country from which the trade is carried on;[77] but ordinarily contraband of war is considered as "lawful goods" within the meaning of a policy or warranty.[78]

A warranty in the policy against contraband or illicit trade will, however, protect the insurer,[79] even though the illicit trade had no agency in producing the loss,[80] unless contraband articles are set forth and expressly named in the policy.[81] And if both insurer and insured on lawful goods in a policy containing a clause of warranty against loss "by capture or detention for or on account of trade in articles contraband of war" know there is contraband on board, the warranty will apply only to the goods insured.[82] Where the consequence of carrying contraband goods is only to subject the goods, and not the vessel, to condemnation, the carriage of such goods is not a breach of such a warranty in a policy on the vessel.[83] The United States Supreme Court has held that in order that the insurer may be exonerated by such a warranty, the seizure or detention must be for a legal or justifiable cause;[84] but in an English case,[85] it was said that it may well be argued that as between the underwriters and the insured the warranty, "no contraband of war," being expressed generally, must include goods which, there being a war between any two countries, would from their nature be especially liable to be seized by either of them, even though such goods, not being intended for one of the countries at war, might not be legally seizable.

A warranty against contraband of war is violated by shipment of goods of a contraband character to a neutral port with the real intention of transshipping them to a belligerent port.[86]

It has been held that such a warranty is not broken by the transport of military officers of a belligerent state as passengers on board a neutral ship, the term being properly applicable to goods only, and not to persons,[87] although such conduct may constitute a breach of a warranty of neutrality.

(To Be Continued.)

[76] Levy v. Merrill, 4 Me. 180.

[77] Richardson v. Maine F. & M. Ins. Co. 6 Mass. 102, 4 Am. Dec. 92.

[78] Seton v. Low, 1 Johns. Cas. 1; De Peyster v. Gardner, 1 Caines, 492.

[79] Decrow v. Waldo Mut. Ins. Co. 43 Me. 460; Seymour v. London & P. M. Ins. Co. 1 Asp. Mar. L. Cas. 423, 41 L. J. C. P. N. S. 193, 27 L. T. N. S. 417.

[80] Thompson v. Mississippi M. & F. Ins. Co. 2 La. 228, 22 Am. Dec. 129.

[81] Howland v. Commercial Ins. Co. Anthon, N. P. 26.

[82] Bowne v. Shaw, 1 Caines, 489.

[83] Thompson v. Mississippi M. & F. Ins. Co. 2 La. 228, 22 Am. Dec. 129.

[84] Carrington v. Merchants' Ins. Co. 8 Pet. 495, 8 L. ed. 1021.

[85] Seymour v. London & P. M. Ins. Co. 1 Asp. Mar. L. Cas. 423, 41 L. J. C. P. N. S. 193, 27 L. T. N. S. 417.

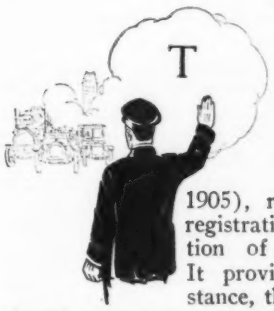
[86] Ibid.

[87] Yangtsze Ins. Asso. v. Indemnity Mut. M. Assur. Co. [1908] 2 K. B. 504, 77 L. J. K. B. N. S. 995, 99 L. T. N. S. 498, 24 Times L. R. 687, 52 Sol. Jo. 550, 13 Com. Cas. 283, 15 Ann. Cas. 239.

The Right to Recover for an Injury Received in an Unregistered Automobile

BY HON. FITZ-HENRY SMITH, JR.,

of the Boston Bar



THE general court of Massachusetts in 1903 passed an act (which was amended in 1905), regulating the registration and operation of automobiles. It provided, in substance, that no person should operate an automobile upon any public or private way in the commonwealth, laid out under authority of statute, unless he had been licensed to do so, and unless his automobile had been registered as prescribed.

While the act was in force, a resident of Connecticut operated his car in Massachusetts without complying with the provisions of the local law as to registration, and was injured in a collision with a street railway car. He sued the street railway company, and the case eventually went to the supreme judicial court of Massachusetts, which held that he was a mere trespasser upon the highway, and could not recover against the defendant, "which was lawfully using the highway with its cars [and] owed to the plaintiff no other or further duty than that which it would owe to any trespasser upon its property; that is, not the duty of ordinary care, as those words are commonly used, but merely the duty to abstain from injuring him by wantonness or recklessness." The case is Dudley v. Northampton Street R. Co. 202 Mass. 443, 89 N. E. 25, 23 L.R.A.(N.S.) 561, decided June 21, 1909.

In Feeley v. Melrose, 205 Mass. 329, 137 Am. St. Rep. 445, 91 N. E. 306, 27 L.R.A.(N.S.) 1156, decided eight months later, and where the alleged fault was a defect in the highway, the court went a step further, and held that a person who was riding as a passenger in an automobile which was unregistered was not a traveler lawfully upon the way within the meaning of the highway act, but was a trespasser like the plaintiff in the Dudley Case, and could not recover for an injury. And the decision in Chase v. New York C. & H. R. R. Co. 208 Mass. 137, 94 N. E. 377, which involved a disputed question as to the ownership of the car for the purpose of registration, was to the same effect.

The court in the Dudley Case referred to the leading case of Newcomb v. Boston Protective Dep. 146 Mass. 596, 4 Am. St. Rep. 354, 16 N. E. 555, where the fact that a person was injured through another's negligence, while violating a city ordinance, was said not to defeat his right to recover unless his unlawful act was a contributing cause of the injury. In that case, the plaintiff, a cab driver, did not have his cab drawn up length-wise of the street and near as possible to the curbstone, as required by a city ordinance, and was run into and injured by a wagon of defendant going to a fire, which wagon under a statute had the "right of way." The court declared the Dudley Case was not similar, for the reason that "we are dealing here with a peculiar kind of vehicle, which has only recently come into use, which requires unusual care in its management, and the presence of which upon the highways has been found to involve more than ordinary risks to other travelers." They likened the automobile registration act to the old Sunday laws, and said that in the opinion of a majority of the court the legislature "intended to outlaw unregistered machines, and to give them, as to persons lawfully using the highways, no other right than that of being

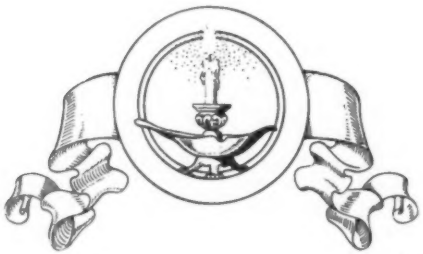
exempt from reckless, wanton, or wilful injury. They were to be no more travelers than is a runaway horse." 202 Mass. pp. 446, 447.

In Bourne v. Whitman, 209 Mass. 155, 172, 95 N. E. 404, 2 N. C. C. A. 318, 35 L.R.A.(N.S.) 701, which involved the rights of an unlicensed person in an automobile, Knowlton, Ch. J., said in reference to the Dudley Case: "Some of us were disinclined to lay down the law so broadly, and the opinion of the court was not unanimous; but the doctrine has been repeatedly reaffirmed, and is now the established law of the commonwealth." More recent decisions bear out this statement, as may be seen from the following cases: Love v. Worcester Consol. Street R. Co. 213 Mass. 137, 99 N. E. 960; Holland v. Boston, 213 Mass. 560, 100 N. E. 1009; Holden v. McGillicuddy, 215 Mass. 563, 102 N. E. 923; and Dean v. Boston Elev. R. Co. 217 Mass. 495, 105 N. E. 616, May, 1914.

To meet this situation a bill was introduced in the legislature which has just adjourned, and as a result an act was passed amending the existing laws as to the registration and equipment of motor vehicles. Acts 1909, chap. 534, § 9. The new act is chapter 87 of the General Acts of 1915, and provides that a violation of the provisions of the law as to the registration and equipment of motor vehicles "shall not constitute a defense to actions of tort for injuries suffered by a person, or for the death of a person, or for injury to property, unless it is shown that the person injured in his person or property or killed was the owner or operator of the motor vehicle the operation of which was in violation of said provisions, or unless it is shown that the person so injured or killed, or the owner of the property so injured, knew or had reasonable cause to know that said provisions were being violated."

Owners of automobiles would probably have preferred the law to provide simply that a failure to register should not be considered a defense to an action of tort. But the legislature was not willing to go to that length, and while the language of the act is perhaps not wholly happy, read in the light of the decisions its purpose is clear, namely, to protect innocent passengers in unregistered automobiles.

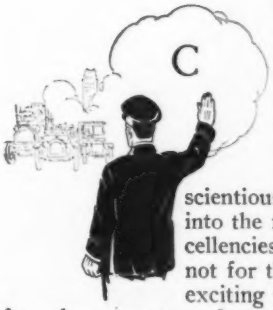
The fact that the *operator* of the automobile is not licensed does not alone bar recovery in Massachusetts. *Cf.* Bourne v. Whitman, supra; Holland v. Boston, 213 Mass. 560, 100 N. E. 1009, and Conroy v. Mather, 217 Mass. 91, 104 N. E. 487, 52 L.R.A.(N.S.) 801.



The Preservation of our Constitutional Guaranties

BY LENN J. OARE

of the South Bend (Ind.) Bar



CRITICISM may be either constructive or destructive. Constructive criticism conscientiously examines into the faults and excellencies of a subject, not for the purpose of exciting prejudice, but for the purpose of correcting evils, if any there be, and amplifying existing and dormant excellencies. Such criticism is cool, logical, unbiased, and deliberate. Such criticism is always welcomed by the real friends of any institution, for they recognize that it is largely by such criticism that institutional progress is made. Destructive criticism, upon the other hand, is a vicious attack upon the very existence of an institution, and seeks its destruction regardless of consequences; usually appeals to the passions, and not to convictions; is radical, not conservative; and is ofttimes prompted by lust for wealth or political power. When Rome reverenced her governmental institutions and traditions, when her statesmen and thinkers worked most thoughtfully and conscientiously to perfect Roman institutions but held fast to the Roman eagle and all that it meant, Rome was rapidly ascending to the heyday of her glory and power, in government, in intelligence, and in morals. This was the time when a Roman citizen was proud of the fact that he was a Roman. This was the period of her constructive criticism. But when her statesmen and thinkers began to attack the very existence of her governmental institutions, when traditions and governmental axioms accumulated by the thought and experience of centuries were put at naught, then the star of Rome impetuously descended to its western setting.

Bryce in his American Commonwealth, writing in 1888, one year after the celebration of the centenary of the Constitutional Convention, after speaking of the Constitution in praising terms, said that the reverence for it "is itself one of the most wholesome and hopeful elements in the character of the American people." I do not believe that at the present time Bryce would find these elements of wholesomeness and hope. There was a time when the Constitution was praised as the palladium of our liberties; it was praised because of its nice distribution of the legislative, executive, and judicial powers. But it seems that the modern doctrine is that the system of checks and balances exists for the purpose of thwarting the will of the people. At the present time the most popular utterance one can make is a denunciation and villification of our national Constitution, and more particularly of its balance wheel, the Supreme Court of the United States. A few Athenians became tired of hearing Aristides called "The Just," and united in a movement to ostracize him. Some of our citizens evidently have become tired of hearing the Constitution praised and reverenced by so many millions of free people, and have determined upon its destruction. Ranting politicians and demagogues are directing their energies in arousing the passions and prejudices of the masses, in stirring up class hatred, in expounding sophistries of government. "The rich are growing richer and the poor poorer," they say, "and therefore we should have the recall of a judge who supports that ignominious document, the Constitution of the United States." This is about the kind of a syllogism they em-

ploy. They have no hesitation in changing the laws of thought in their bold attempt to destroy the Constitution. With them, any means will justify the end. If a writer wishes to write a book on government, he chooses to follow the same line of criticism. Otherwise his book would net little or no royalty. Montesquieu's "The Spirit of the Laws," Hamilton's "Federalist," and Woodrow Wilson's "The State," are dust covered and shelf worn, but Myer's "History of the United States Supreme Court" is being read and eloquently quoted in the press and on the platform. I am almost persuaded to believe that if I were a candidate for some high office, and wanted the job to such an extent as to subjugate my convictions to my lust for power, I would adopt a platform the underlying principle of which would be, "After us, the deluge."

LENN J. OARE

In the American commonwealth we find it said that "The American Constitution is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past; and that the more slowly every institution has grown, so much the more enduring it is likely to prove. There is little in the Constitution that is absolutely new. There is much that is as old as Magna Charta" (vol. 1, p. 29). Yet there are not lacking those who would have us believe that the Constitution was a scheme conceived by the aristocrats of 1787, and enacted into the basic law of this nation for the furtherance of their own selfish interests; that it was not formed for the protection and general welfare of the proletariate or the whole people, but for the elite; that the government thereby established is aristocratic, and not democratic. In fact this argument is so often advanced by the enemies of the Constitution that it might be termed the major premise of their political philosophy. But whether the dominant spirit of that convention was aristocratic or democratic, the fact of the matter is that the Constitution in its essence was the result of the political history of the Anglo-Saxon race. The framers of the Constitution had inherited from their motherland the entire fabric of Anglo-Saxon political philosophy. The Magna Charta, The Petition of Rights, The Bill of Rights, The Habeas Corpus Act, and every document and principle incorporated into the English unwritten Constitution, they claimed as their own. It was because of the fact they were not treated as English citizens, because of the fact that the provincial government provided by their mother country and under which they were living was destruction of their unalienable rights of "life, liberty, and the pursuit of happiness," and because of the fact that when accused of crime they were not accorded the right of trial by a jury of their peers, but were transported beyond the seas, there to be tried among strangers, in short, it was because of the fact that England denied to the colonists the political traditions of England that caused them to declare their independence. Prior to the convention of 1787, each of these colonies had es-

tablished a government of its own, based upon Anglo-Saxon political traditions and assuring its citizens the unalienable rights of life, liberty, and the pursuit of happiness, and in addition the combined thirteen colonies had formed a union known as "The United States of America" by means of the Articles of Confederation. The individual state governments were fairly successful, but the Union, for reasons known to every school boy, was not. In this Constitutional Convention, the individual state Constitutions, the Articles of Confederation, and the political traditions of the race, were the materials, and the Constitution was the result. The substance of the Constitution, therefore, was not the scheme or machination of unscrupulous or selfish men, but was the embodiment of a nation's political philosophy. The members of the Constitutional Convention simply gave form to the already existing substance.

Nor is it true that the Constitutional Convention was dominated by the aristocracy. Far from it, the leading spirit was unquestionably a Democrat, and was no less a Democrat than James Madison. Hamilton is usually spoken of as the preeminent man of the Convention. This is not true. Hamilton was perhaps the strongest man intellectually in the Convention, and perhaps suggested a more logical and consistent plan of government than that finally embodied in the Constitution, but Hamilton was out of touch with the situation because of the very fact that he was aristocratic rather than democratic, and his views were too radical to be acceptable to the Convention. Within his own delegation (New York) he was outvoted, and before the Convention was half over his two colleagues had withdrawn and he was deprived of his vote, whereupon he went to New York and returned to the Convention only occasionally, taking very little part in the remaining sessions. But Madison, the Democrat, was regarded throughout the Convention as the leader of those who favored a strong national government: he evidently had the best grasp of the situation. A careful and consistent study of the records of the Convention, as compiled by Max Farrand will disclose the fact that Madison's plans and ideas invariably prevailed and were largely incorporated into the Constitution. Hamilton has been given credit for being the leading spirit of the Convention because of his having proposed the Constitutional Convention at the Annapolis convention, and because of his patriotic defense of its provisions after its completion and his earnest efforts in securing its adoption by his own state, New York. Hamilton accepted the Constitution not because it was his own creature, or because it embodied his own extreme ideas, but because he regarded it as the only expedient. Hamilton was an aristocrat, but was broad-minded enough to concede the excellencies of a Constitution framed by Democrats and became its greatest champion. The Constitution then is not the result of a scheme or machination of the aristocracy of 1787 to promote its own selfish interests, but upon the contrary is the result of Anglo-Saxon political thought put into form by a convention, the leading spirit of which was democratic.

I will admit that there are evils in practice and in administration that should be corrected, but these evils call for a remedy far different from an insidious attack upon a Constitution built upon the political philosophy of centuries and hallowed by some of the greatest men in judicial history.

The attacks upon the Constitution are more specifically directed to the independence of the judiciary, or to the Supreme Court of the United States. The sciolists and the doctrinaires more vehemently and assiduously assail this doctrine of the independence of the judiciary than any other governmental institution. By proclaiming their faith in the majority of the electorate in all cases, by cursing and villifying the Supreme Court, by telling us that we are all unbiased and unprejudiced jurists but that the particular men who happen to sit upon the Supreme bench are subject to servile interests, they would have us undermine the independence of the judiciary. Their substitute and general panacea, of course, is the recall of judges, or in its modified form, the recall of judicial decisions. Now, I do not propose

to discuss the recall of judges or the recall of judicial decisions, only in so far as to show that any interference with the independence of the national judiciary would seriously endanger the constitutional guaranties of life, liberty, and the pursuit of happiness.

Prior to the War of Independence the colonists had suffered from absolutism, not only from the absolutism of a King, the executive branch of the English government, but also from the absolutism of Parliament, the legislative branch. They believed that they possessed rights, accorded them by the law of nature and arising out of the mere fact of their having been born, the unalienable rights of life, liberty, and the pursuit of happiness. These rights they intended that no power, neither the legislative nor the executive, nay not even the majority of the people themselves, should be able to take from them. They intended that every branch and department of government, even the arbitrary will of the majority, should be subject to law. They intended to form a government of laws and of principles, and not a government dependent upon the absolutism of any man or group of men. These intentions were incorporated into the fundamental law of the land.

But how was absolutism and arbitrary power to be eliminated and its return forever prevented: First, by distributing the powers of government among three co-ordinate branches, so that no one branch could assert itself in a purely arbitrary manner; second, by providing that no branch of government, no person or group of persons however formidable, should devest them of certain inalienable rights. Obviously, then, neither our Congress nor the arbitrary will of the people can legislate to devest us of inalienable rights. This constitutional limitation, enforceable by judicial decisions, safeguards our sacred rights. Our sister American Republics have substantially adopted our Constitution with the exception of this constitutional limitation. Turmoil and strife have followed. These people of Latin America have followed leaders and have not held fast to fixed principles. The same is true of France, who has had eleven different Constitutions.

This new school of political thought maintains that under our Constitution the Supreme Court has no right to declare a legislative act invalid, and that if such a right exists it should be curtailed. This argument was answered absolutely by Chief Justice Marshall in the case of Marbury v. Madison (1803) 1 Cranch, 137, 2 L. ed. 60. Marshall's argument is unassailable. Chancellor Kent says that his opinion "approaches to the precision and certainty of a mathematical demonstration." Certainly, better reasoning cannot be expected in human society.

Marshall shows that our government is assigned to three departments, and that certain limits, not to be transcended by these departments, are established; that the powers of the legislative are defined and limited, as are the powers of the other co-ordinate departments. "To what purpose," say Chief Justice Marshall, "are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" And, further, "The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law: if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."

The Constitution declares that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, etc., shall be the supreme law of the land." Some people seem to forget that the Constitution itself is law, and that the court is ofttimes required to apply either the law as set out in the Constitution or the law as enacted by the legislature. When they conflict, can we say that the act of the legislative branch is paramount to the Constitution? Can we say that the Constitution, the fundamental law as enacted and adopted by the whole people, must be cast aside for the unauthorized enactments of the legis-

lative branch? To decide what the law is, is certainly a judicial power; and if the Constitution and the legislative enactments conflict, the court's duty is to decide which is law. Again, if the legislative branch has exceeded its authority and passed an act repugnant to the Constitution, must the court accept the invalid act as valid and close its eyes to the Constitution? And this notwithstanding the oath of the judges to discharge their duties "agreeably to the Constitution and laws of the United States?"

If the Supreme Court has no authority to declare laws unconstitutional and void, then of what consequence are our constitutional guaranties? Without recognizing such authority, acts of confiscation, acts reversing judgments, and acts directly transferring one man's property to another, legislative judgments, decrees, and forfeiture in all possible forms, would be the law of the land. The mere declaration of the legislative branch would be law and enforceable as such. For instance, the Constitution says that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof," but what if we Methodists should control Congress and establish Methodism as a state religion, compelling all you Presbyterians, and Catholics, and whatnots, to attend our church, help us pay our pastors, and pray with us at our altars? What if Congress should go further and should enact that no one but Methodists should be eligible to any political office? An extreme case, I will grant you, but perfectly possible.

This power in the court denied, the legislative branch would become omnipotent and from its decisions there would be no appeal. In fact the legislative could subordinate or entirely annihilate the executive and judicial departments. I can best illustrate this point from American history. Until 1814, the Vermont supreme court did not presume to declare a law unconstitutional. In view of the fact that our laws were derived from England, and that in England the omnipotence of the legislature was a well-recognized part of the law, it was but natural that the first impulse in this country should be to draft this principle into our system; and it was not until 1814, as I have said, that the supreme court of Vermont exercised its power to declare a legislative enactment unconstitutional. So, here we have an example of an American commonwealth, existing under a written Constitution, distributing the powers of government among three supposedly co-ordinate branches, and defining and limiting each branch; but where the supreme court of the state considered itself as unauthorized to set aside an invalid act of the legislature, What was the result? Just what we might expect. "The legislature frequently interfered with the Judiciary Department. They passed an act prohibiting the prosecution of any real or possessory action or any action on contract. They passed acts vacating and annulling judgments. They constituted themselves a court of chancery. They appointed a board of commissioners with full power to decide in a summary manner all disputes relative to titles of lands. They also frequently granted new trials in cases which had been finally decided by the judiciary." But a member of this modern school of political thought would say that such an arrogant and atrocious legislature should be recalled. They were recalled,—once each year throughout all this time, the term in the Vermont legislature being one year. In Vermont during those thirty-eight years from the signing of the Declaration of Independence to the time when her supreme court first exercised the right to set aside an invalid act of the legislature, the guaranties of life, liberty, and the pursuit of happiness, written in her Constitution were puerile and absurd. Such a condition could be expected with reference to our national Constitution should the power of the Supreme Court of the United States to declare legislative enactments unconstitutional be removed.

Ofttimes the assertion is made that the Supreme Court arrogates authority and decides that a statute is unconstitutional, basing its decision on some unreasoned and useless technicality, or that the judges are barnacled to stale and time-worn precedents, or that the decision moves from a desire to serve big interests.

We must remember that a court does not declare a statute unconstitutional merely because it is against natural justice, nor because it is against the "spirit" of the Constitution, nor even because the statute is oppressive or unjust; the court does not question the wisdom, propriety, or policy of a statute, nor inquire into the motives that prompted the legislature. The statute must conflict with some express provision of the Constitution or the courts will permit it to stand. Every presumption is indulged in favor of its constitutionality, and if any reasonable doubt exists as to its constitutionality, it will be upheld.

Now, let us examine one of the cases that has brought such wholesale criticism upon the Supreme Court of the United States. The Supreme Court in what is familiarly known as the Bake-shop Case (Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133), rendered in 1905, held that a statute of the state of New York, limiting the hours of labor in bakeries and confectionery establishments to ten hours in any one day or sixty hours in any one week, was unconstitutional, the court maintaining that such a statute was an arbitrary interference with the freedom to contract guaranteed by the 14th Amendment. For this decision the Supreme Court was severely criticized by the carping critics. They said that this statute was declared unconstitutional by reason of a technicality. (And let me inject right here that by technicality they could mean nothing else than a decision founded upon a rule of law or equity of such long standing as to become fundamental, as are many provisions found in our Constitution.) Let us place ourselves in the position of the judges who decided this case and denounced the statute limiting the hours of labor in a certain industry unconstitutional, and as an attempt to undermine the freedom of contracts. Let us see if the judges were blind to the demands of progress and barnacled to stale and time-worn precedents. Was this decision rendered from a desire to serve big business and to give it an opportunity to compel men to work for thirteen or fourteen hours a day and seven days in the week at starvation wages? Any person who has spent any time in the study of our system of laws will answer, "No." He knows that those judges foresaw in the light of investigation of just such attempts for centuries by and through the channels of those "stale and time-worn" precedents, the forerunner of perhaps the complete destruction of our freedom to contract. He knows, as did those judges, that if one law were permitted to stand which denied a man the right to contract as he saw fit, that a hundred or thousand laws could be passed negativing the freedom of contract, until neither you nor I could enter into a contract without first receiving authority from some department of government, and that that department of government could impel us into contracts that would practically devest us of our property and subject us to a paternalism as despicable as the absolution of Persia. If you will examine into the motive of these judges, you will find that they had as their ideal the safeguarding of our freedom, not by individual whimsical ideas and petty notions, but by the analysis of thousands of precedents along this and similar lines; and not merely by the analysis of precedents, if you please, but the Constitution of the United States, the people's power of attorney to the Executive, Legislative, and Judicial branches of our government, declares that no state shall "deprive any person of life, liberty, or property without due process of law." Certainly laws can be passed and are passed, denying freedom of contract, and depriving citizens of their life, liberty, or property without due process of law. Certainly we do not wish such unauthorized statutes to stand as against the Constitution. Then it is only that we differ in opinion as to when the Constitution and a given statute is in conflict, that we criticize and damn our Supreme Court. It is not that the court's opinion is based upon an unreasoned and useless technicality.

This leads me to another consideration. Granting for the sake of argument that the courts have no power to set aside statutes as unconstitutional, and further that no such power is necessary to our constitutional guaranties, then why have a hard and fixed rule by which a

statute is to be tested? Why not then permit any statute to stand regardless of these so-called technicalities? Silly questions, it seems to me. Why did the Creator establish fixed laws? Why the law of gravitation? Why not one apple fall to the ground and the other pop out into the void unknown? Why does the sun not rise occasionally from under the pole star? It is true that our human law can never attain the ideal of natural laws, but why not approach the ideal instead of building a house of Babel? Why not work out a system that will each day bring men to a better understanding of the social relations of man to man? Such a system we have, and its destruction could mean nothing but chaos. Without this system, we could not anticipate the morrow. The laws of to-day could be subverted, and to-morrow the millionaire would become the pauper and the pauper the millionaire.

Some would point to the English government where the High Court of Judicature has no power to declare an act of Parliament unconstitutional. Our government is derived from the English, and consequently they say, our Supreme Court should have no more power than the High Court of Judicature. Although our government is derived from the English, the analogy is misleading. We must remember that with Parliament rests the entire sovereignty of the British Empire, and it can exercise at pleasure all the various powers of government,—legislative, executive, and judicial. In fact at the present time it does exercise both the legislative and executive, and materially controls the judicial; the Law Lords of the House of Lords being the High Court of Appeal, and the composition and administration of the courts being under absolute dominion of Parliament. Blackstone says of Parliament: "It can change and create afresh even the Constitution of the Kingdom and of Parliament themselves, as was done by the act of Union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament." The Parliament of England is elected with the idea that it is not only a legislative body, but that it is also in effect a constitutional convention. The only check upon the absolutism of Parliament, aside from a regular election, is that if the House of Commons votes a want of confidence in the ministry (which ministry is really chosen by the House of Commons) the ministry may refuse to resign and appeal to the country for support. This dissolves Parliament and calls for an election, giving the people an opportunity to support either Parliament or the ministry as they see fit. Usually, however, a vote of the lack of confidence terminates the ministry. The House of Commons then chooses the new premier, who organizes a new ministry compatible with the House, thus subjugating entirely the executive functions of government to the control of the legislative.

In this country sovereignty is retained by the people, and the government is carefully separated into the legislative, executive, and judicial functions. Since these functions are assigned to different departments, and these departments all derive their authority from a written Constitution, one department is necessarily excluded from exercising the functions conferred upon the others. So long as we the people of the United States retain our sovereignty and assign the functions of government to three co-ordinate departments, it is evident that the analogy between our Legislative Department and the Parliament of England cannot be carried very far. If we wish to deny to our Supreme Court the power to declare legislative enactments unconstitutional, we must be willing to accept a parliamentary government, a government with an unbridled and omnipotent legislature such as the Parliament of England.

It has been claimed that ours is the only great country in which a court can and does overthrow an act of the legislative branch of the government because the act is without constitutional authority or in violation of constitutional command. Such is the statement of Senator Cummins in the Independent of June 1, 1914. The fact is that in nearly every one of the English colonies whose gov-

ernments are embodied in written Constitutions by which a separation is effected between the executive, legislative, and judicial functions, the courts exercise power to pass upon the constitutionality of acts of the legislature, precisely as courts in the United States have done from an early date.

Such is true in Australia, New Zealand, and Canada. The Privy Council of England has passed upon the constitutionality of acts of colonial legislatures for years. It was in 1728 that it declared invalid a statute of the colony of Connecticut upon the ground that the statute "was not warranted by the charter of the colony."

In Australia, the Constitution of 1900 not only recognizes such authority, but also provides that under certain circumstances the legislature or the executive may require the opinion of justices of the high court upon constitutional questions. Roosevelt's new fad, "The Recall of Judicial Decisions," was proposed to this Constitutional Convention of Australia in 1900, twelve years before the birth of the Progressive party, but was voted down by an overwhelming majority, and instead, a provision was almost unanimously adopted expressly conferring upon the judiciary the power to decide whether or not the legislative enactments fell within the power granted the legislative branch.

Now, more specifically as to whether the delegates in the Constitutional Convention had in mind the granting of the power to set aside legislative enactments to the Supreme Court. I have already said that this power was exercised by the English Privy Council in declaring statutes contrary to colonial charters invalid. This is significant in view of the fact that perhaps the charters granted the colonies were the first written instruments limiting and defining governmental powers. Soon after the Declaration of Independence the question was raised in the states as to whether the courts could exercise authority to declare an act of the legislature unconstitutional. Probably the first case to hold that the courts have such authority was Com. v. Caton, 4 Call. (Va.) 5, decided in 1782, five years prior to the Constitutional Convention. The legislative act in this case was merely a resolution of the Senate, not concurred in by the lower house, but Judge Wythe speaking for the court said: "If the whole legislature, an event to be depreciated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will say to them, 'Here is the limit of your authority, and hither shall you go, but no farther.'" Decisions in other states rapidly followed. Consequently we would presume that these men who sat in the Constitutional Convention knew something about the judicial exercise of power to set aside legislative enactments. And so, we find from an examination of Elliott's Debates on the Federal Constitution, that efforts were made in the Convention to forestall the power of the Supreme Court to declare acts of Congress unconstitutional by conferring upon the court and the President jointly, the right of the revision and veto. It is needless to say that this effort was unsuccessful. Afterwards, as if to make such authority on the party of the Supreme Court doubly sure, Mr. Johnson moved that the judicial power be extended "to all cases arising under the Constitution" (Elliott, 483). And in the Federalist, 74, we find the Supreme Court spoken of as the "bulwark of a limited Constitution against legislative encroachments." From these records, we can reach but one conclusion, that is, that the framers of the Constitution intended the Supreme Court to exercise the power of declaring invalid legislative enactments repugnant to the Constitution. Yet there are not lacking those who seriously maintain that no such authority was intended by the framers of the Constitution, and that the case of Marbury v. Madison brought this power into existence for the first time.

It seems to me that the establishment of the Supreme Court as the controlling and regulating power of the Constitution was the greatest conception of the Constitution, and "constitutes the crowning marvel of the wonders wrought by American statesmanship."

The states refused to ratify the national Constitution until they were assured that the first ten amendments or

"the Bill of Rights" would be added, thus evidencing their concern for the rights of the individual citizen as against the arbitrary will of governmental bodies. Mr. Root has described the Bill of Rights as a "covenant between overwhelming power and every weak and defenseless one; everyone who relies upon the protection of his country's laws for security to enjoy the fruits of industry and thrift; everyone who would worship God according to his own conscience, however his faith may differ from that of his fellows; everyone who asserts his manhood's right of freedom in speech and action,—a solemn covenant that between the weak individual and all the power of the people, and the people's officers, shall forever stand the eternal principles of justice, defined and made practically effective by specific rules in those provisions which we call the limitations of the Constitution." Yet this new school of political thought would have these rights placed at naught, or would change them by the simple and easy process of legislation. They would lopp from the only department of government that has any disposition to maintain the supremacy of the Constitution, or is able to preserve to the people their constitutional guaranties, its inherent rights and duty to follow the Constitution, rather than statutes made in its derogation. Their one thought seems to be to devest the courts of the opportunity to longer protect the people in their sacred and inalienable rights.

Of course, they tell you that the people will protect their own rights; that the majority is never wrong. We have already observed that the minority has rights as against the majority, and that without the practical operation of constitutional limitations through courts of justice, sovereignty would reside in the legislative department or some other governmental body. But even if no such revolutionary results would follow, do you have such absolute confidence in the will of the majority, and that will exercised without debate and deliberation? Do you believe that omniscience is always present in the mere preponderance of numbers? Do you believe that your life, your liberty, and your property should be subject to every wave of popular excitement? Do you wish to submit to the majority the making, the constitutionality, the interpretation, and the enforcement of laws? If you have such implicit confidence in the majority of all the people, what about the temporary majority, or the majority of those actually voting on a measure?

Yes, these carping critics would break down these guaranties of life, liberty, and the pursuit of happiness. They must know that when these guaranties are broken down, absolute power will surely rest somewhere. But where? They don't seem to care where it goes, whether to the people, to some governmental officer or commission, or vanishes into thin air.

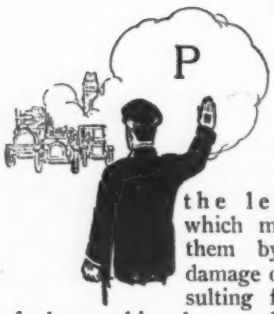
Criticism may be deserving, and the proper kind of criticism may lead to constructive statesmanship. We must recognize the wave of dissatisfaction about us, analyze the cause if possible, and seek to eradicate the evils from our governmental institutions, but without destroying a Constitution that is the result of the political thought of centuries, and which has served our country so well during a period of national growth heretofore unknown to the world.

Lenn J. Dare

Owner's Liability for Injury Occurring While Automobile is Being Used by Member of His Family

BY JOSEPH T. WINSLOW

of the Massachusetts Bar



PROBABLY few prospective purchasers of automobiles for general family use reflect upon the legal liability which may attach to them by reason of damage or injuries resulting from the use of the machine by members of their family. In view of the present state of the law and its apparent trend, however, it would appear a wise course, from a financial standpoint, for purchasers and owners of cars intended for such use to give attention to this question, and to see to it that when they are being used on the public highway they are at least in charge of persons competent to operate and manage them.

There are two theories upon which it has been sought to hold owners responsible for injuries resulting while their cars are being operated or used by members of their families; first, upon the theory of *respondeat superior*, and, second, upon the doctrine of dangerous agency or instrumentality.

Principle of Respondeat Superior.

The general rule at common law, that a parent is not liable for the independent negligent or tortious act of his child merely by reason of the relationship existing between them, is applicable in actions for negligence against a parent to recover for injuries resulting from the operation of the parent's automobile by his child.[1]

And a father cannot be held liable for the negligent operation of his car by his son merely because he owned the car, or because he permitted the son to drive it whenever he wished, or because the driver was his son.[2]

But a minor child may become the servant of his parent by a particular arrangement, without any agreement for compensation.[3]

Operation of Car by Child for Benefit of Other Members of the Family.

It is a natural arrangement for a father whose time is largely occupied, and who does not care to undertake the operation of the car himself, to buy an automobile with the understanding that one of his children shall operate it for the family. Out of such a situation it is obvious that the facts may be such as to show a relationship of master and servant between the father and child, which will render the former liable for the negligent operation of his car by the latter when acting for the father's purposes.

It has been held that a son is acting as a servant or agent of his father, and that the latter is liable for an injury resulting from the son's negligent operation of the car, where it was bought for the pleasure and comfort of the owner and his family, and his son was authorized to use it at any time, and at the time of the

[1] Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A.(N.S.) 87; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761; Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096.

[2] Maher v. Benedict, 123 App. Div. 579, 108 N. Y. Supp. 228.

[3] Parker v. Wilson, supra.

injury he was driving it for the pleasure of himself and his sister with a friend who was a guest of the father's family.[4]

And in an action to recover for the negligent operation of the defendant's car while it was being driven by his son at his mother's request, it has been held that the facts were sufficient to warrant the inference that the son was acting in accordance with general instructions, expressly or impliedly given by his father, where it appeared that the machine was bought for the general family use and registered in the owner's name, but the only one licensed to run it was his minor son, and the father testified that his wife had permission to use it whenever she desired without making a special request to do so, and that he expected his son to mind his mother if she wished to be taken out.[5]

And in the same case an instruction that if the father had directed his son not to be out after dark, and the son was driving after dark at the time of the injury in question, there could be no recovery, was held to have been properly refused, where the father had merely cautioned the son not to be out after dark, but admitted that he did not intend that the car should not be brought home if the son chanced not to get home before dark.

And it was held that such an instruction was properly refused upon the ground that the jury might have found that the business of the father in this connection was that the son should follow the mother's directions, and that if this involved being out after dark this would be the father's business.

Where, however, at the time an automobile owned jointly by a husband and wife was carelessly operated and caused injuries, it was being used by the wife without the husband's participation, and being driven at her request by her son, who was her husband's step-son, the husband cannot be held liable, since the son was not acting as his agent.[6]

It has been held that upon the question whether a son operating his father's car at the time of its collision with another car was acting as the servant of his father, evidence is admissible that he was the regularly employed chauffeur of his father, living with his family, and that the father was present when the son started to take persons whom he had carried to a dance home, and gave instructions as to the headlights, such evidence being held proper for the consideration of the jury upon the question whether the son was representing his father at the time the accident occurred.[7]

Use of Car by Member of Family for His Own Purposes.

As a general rule, the owner of an automobile cannot be held liable on the principle of *respondeat superior* for injuries sustained through the negligent operation of his machine by a member of his family; as, for example, a child, while the latter is using it for his own pleasure; and this is, of course, especially true where the car is being used without the owner's consent or against his prohibition.

The use of such a car under the following circumstances has been held to cast no liability on the owner for injuries resulting from its operation:

Where at the time of the injury it was being used by a niece residing in his household, who at the time was not operating the machine for the owner's general or special purpose, but for her own pleasure.[8]

Where his twenty-year-old son took his father's car to deliver some of his presents, without his father's knowledge or direction, and after the latter had told him that it was not a fit day for driving the machine.[9]

Where his son, who was a clerk in his father's store, was using the latter's car

[4] McNeal v. McKain, 33 Okla. 449, 126 Pac. 742, 41 L.R.A.(N.S.) 775; Stowe v. Morris, 147 Ky. 386, 144 S. W. 52, 39 L.R.A.(N.S.) 224.

[5] Smith v. Jordan, 211 Mass. 269, 97 N. E. 761.

[6] Towers v. Errington, 78 Misc. 297, 138 N. Y. Supp. 119.

[7] Bourne v. Whitman, 209 Mass. 155, 95 N. E. 404, 2 N. C. C. A. 318, 35 L.R.A.(N.S.) 701.

[8] Roberts v. Schanz, 83 Misc. 139, 144 N. Y. Supp. 824.

[9] Maher v. Benedict, 123 App. Div. 579, 108 N. Y. Supp. 228.

for his own purpose without his father's express authority, and after the latter had ordered it put in the garage.[10]

Where it appeared that the owner's son took the car for a pleasure ride against his father's positive prohibition, and that the injury occurred while the son was racing with the plaintiff's car, although there was evidence that the father had purchased the machine for the use of himself and family, and that his son had sometimes acted as chauffeur.[11]

Where the son of a physician who kept two automobiles for use in his practice, and had a chauffeur to drive them, was using one of the machines for his own and his friend's pleasure without his father's knowledge, although he had the mere permissive use of the machine.[12]

And in an action against an owner to recover for an injury which occurred while his nineteen-year-old daughter was using it for her own pleasure, in driving her friends, it has been held that a verdict should be directed for the defendant where it appears that the father owned the automobile, and that the daughter was accustomed to drive whenever she saw fit, asking permission when the father was accessible, but, when he was not, taking it without permission.[13]

In a Georgia case it was held that no cause of action was set forth against the owner of an automobile by a count which alleged that the defendant, a widow, having exclusive control of her minor daughter, was the owner of an automobile, and that the daughter was riding in it, having authority and command over its movement, and that it was being driven by a third party when it was negligently run into the plaintiff, there being no allegation connecting the owner with the injury, and the fair inference being that the third party was operating the machine at the instance of the daughter.[14]

And it was further held that this count would set forth no cause of action under a statute making every person liable for the torts committed by his child or servant by his command or in the prosecution of his business, although an amendment of the count alleged that the automobile was kept for the comfort and pleasure of the owner's family, who were authorized to use it at any time for their pleasure; it being held that, in order to render the parent liable under such statute, the child must have been engaged in the parent's business.

In Minnesota it has been held that the question of the owner's liability is properly for the jury on the question whether at the time of the injury the automobile was being used for the purpose for which it was kept, where there is evidence that his adult son, who lived at home and was a member of his father's family except when periodically away, on the day of the accident in question had been at work for his father, and that after completing his work, during the absence of his father and mother, and without express permission, together with a younger brother, he took the machine to go to a neighbor's where other members of the family had gone for supper, and that while thus using the car it caused a horse to become frightened and to run away and injure the plaintiff, and it appearing further that the son had operated the car from time to time, but generally with his father's express permission.[15]

And in another Minnesota case it was held that the case should be submitted to the jury, where there was evidence that the defendant kept the automobile which caused the injury, for the pleasure and convenience of himself and family, and that it was usually driven by his nineteen-year-old daughter, who was authorized to use it whenever she desired, and that on the day the accident occurred she took the car and permitted another to drive it, and that the injury occurred through the latter's operation of the machine.[16]

[10] Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946, 18 Am. Neg. Rep. 412.

[11] Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096.

[12] Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A.(N.S.) 87.

[13] Doran v. Thomsen, 76 N. J. L. 754, 131 Am. St. Rep. 677, 71 Atl. 296, 19 L.R.A.(N.S.) 335.

[14] Schumer v. Register, 12 Ga. App. 743, 78 S. E. 731.

[15] Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745.

[16] Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1091, 51 L.R.A.(N.S.) 970.

In a New Jersey case, an instruction in an action against a father to recover for an injury received through the negligent operation of his automobile by his daughter, that if she took the machine in pursuance of the general authority of her father to take it whenever she pleased, for the pleasure of the family and for her own pleasure, for the purposes for which the master bought it, for the purpose for which father owned it, for the purpose which he expected her to operate it, then she was the servant of the father, and that under those circumstances that was the business for which the father bought the machine, was held erroneous on the ground that it based the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring the ownership of the automobile, and its permissive use by the child, and ignored an essential element in the creation of that status as to third persons, that such use must have been in furtherance of, and not apart from, the master's service and control.[17]

View Taken by Missouri Court of Appeals.

The view has been taken in some cases by the Missouri court of appeals, that a father who furnishes an automobile for the pleasure of his family may be held liable for an injury occurring through the negligent operation of the machine by his son, on the theory that the son was using it for one of the purposes for which it was kept, and was therefore acting as his father's servant or agent.

In one of these cases the owner of an automobile kept for family uses was held liable for an injury inflicted while it was being driven by his minor son, who acted as chauffeur for the family, for his own pleasure with his father's consent, upon the theory that the car was being used for one of the family purposes for which it was kept.[18]

In another of these cases the son of the owner was held to be acting as his father's agent in operating the latter's car for one of the purposes of its intended use, where it appeared that it was kept for the use and pleasure of the owner's family, of which the adult son in question was a member, that the son was not employed as a servant by his father, but had served as chauffeur for the family, and had been permitted to use the car for his own purpose, and that when the injury in question occurred he was using it to save walking down town, although it did not appear whether he was about his own business or that of his father.[19]

The two preceding decisions were followed in a subsequent case where a father had purchased an automobile for general family use, and testified that none of his children were to use it without his or his wife's consent, but that they had never refused such consent, it being held that the father was liable for an injury which occurred while it was being operated by his adult son who lived at home and worked in a bank of which his father was president, it appearing that the car had been left in front of the bank by his mother, apparently for his use, and that he took some employees of the bank for a pleasure ride after business hours, during the course of which the injury in question occurred. The court here said: "We think that when an automobile is provided for family use, and is being used by another member of the family than the owner, but with the owner's consent, that he should not be heard to say that such other is not his agent or servant."[20]

A motion to transfer this case to the supreme court was, however, sustained by a divided court, in 180 Mo. App. 259, 165 S. W. 1132. Sturgis, J., in sustaining the motion, remarked that this case and the two followed by it made a radical departure from the law of master and servant as it had heretofore existed; that previously, in order to render the master liable for the negligent act of his servant, that relation must have existed at the time of the act, and such act must have been committed in the course of the serv-

[17] Doran v. Thomsen, 76 N. J. L. 754, 131 Am. St. Rep. 677, 71 Atl. 296, 19 L.R.A.(N.S.) 335.

[18] Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351.

[19] Marshall v. Taylor, 168 Mo. App. 240, 153 S. W. 527, 6 N. C. C. A. 313.

[20] Hays v. Hogan, 180 Mo. App. 237, 165 S. W. 1125.

ant's employment, and have been connected with some business of the master in which the servant was engaged; and stated that by the law established in certain Missouri cases the fact that the alleged servant was using the instrumentalities of the master at the time an accident occurred was not sufficient to render the master liable. Continuing, the judge said: "Of course, the son may be his father's servant, and be engaged in his father's business in operating his automobile, and the doctrine of *respondeat superior* would apply; but how can it be said that, merely because a father permits his son to use his automobile for taking a purely pleasure ride of his own, the son is his servant in so doing, and is engaged in the master's business? If so, it may well be said that every instrumentality of pleasure furnished by the father to members of his family makes each member a servant of the father in using the same, and such use a business of the father which such servant is prosecuting for him." And after further examining the decision in Daily v. Maxwell, supra, the court continued: "I am persuaded that the distinction should be made as to the liability of owners of automobiles for negligent injuries by such machines different from that applied to owners of horses, carriages, and other such harmless instrumentalities, and that our statute contemplates such distinction. To make such distinction, however, by holding that the relation of master and servant exists between the father as owner, and a member of his family using the machine for his own pleasure, merely because that is one of the purposes for which the machine is provided, is violative of the general law governing the liability of master for the negligent acts of the servant. The relation of master and servant does not spring from the family relationship."

Operation of Car by Child Under Vendor's Instructions.

In one case where a father was sued for an injury which occurred while his son was learning to operate a car which he had purchased, it was held that a boy of seventeen might be found to be the agent of his father in operating the latter's car, which was purchased at the son's solicitation, with the understanding that he was to learn to operate it for the benefit of the family, if at the time of inflicting the injury he was operating it under the vendor's instructions.[21]

Where Chauffeur is Operating Car for Member of Family.

The owner of an automobile kept for the use of his family is, as a rule, liable for an injury sustained through its negligent operation by his chauffeur while he is operating it under orders of a member of the owner's family.

Thus the owner of an automobile who left it for the convenience and use of his family while he was abroad is liable for an injury which occurs while the car is out under the orders of his married daughter, who was a member of his household.[22]

So the owner of such a machine is liable for an injury occurring through its negligent operation while it is being used by his sons for their pleasure, and without his special permission, and being driven by his chauffeur under the son's orders, where the machine was kept for the general use of the family, and a chauffeur employed to operate it, and the sons given general permission to use it with the chauffeur as a driver.[23]

And it has been held that the fact that a chauffeur who takes out his master's automobile in obedience to a command of the master's family disobeys the master's command not to take the machine out unless the latter accompanies it does not show that he is acting outside the scope of his employment so as to relieve the master from liability for an injury resulting from the negligent operation of the car.[24]

In an English case where, at the time of an injury, the automobile was being driven by the owner's son accompanied by his chauffeur, and the father testified that he allowed the son to use the car, but did not allow him to go without the

[21] Hiroux v. Baum, 137 Wis. 197, 118 N. W. 533, 19 L.R.A.(N.S.) 332.

[22] Winfrey v. Lazarus, 148 Mo. App. 388, 128 S. W. 276.

[23] Cohen v. Borgenecht, 83 Misc. 28, 144 N. Y. Supp. 399.

[24] Moon v. Matthews, 227 Pa. 488, 136 Am. St. Rep. 902, 76 Atl. 219, 29 L.R.A.(N.S.) 856.

driver, the father was held liable for his son's negligence, on the theory that he never gave up control of the machine, but sent the driver, that he might see that the car was properly operated.[25]

In another case where the defendant's son and his coachman were in the automobile at the time an accident occurred, but the son was driving or controlling the machine, it was held that an instruction should be given to the effect that if the jury found either that the defendant left the machine in charge of his son to take it home, or in charge of the son and coachman together, to accomplish that purpose, or in charge of the coachman alone, and the latter neglected his duty and allowed the son to operate the machine, and by the son's negligence the accident occurred, the father would be liable.[26]

Liability on Theory of Dangerous Agency.

It may be stated as a general rule that the owner of an automobile cannot be held liable, on the ground that such a machine is a dangerous agency, for an injury occurring while the car is being used by a member of his family.

It has been held that such a machine is not a dangerous instrumentality, to be classed with locomotives, ferocious animals, etc., and that the owner cannot be held liable, on the theory of dangerous agency, for injuries occurring while it is being used by a member of his family.[27]

And in another case it was denied that an automobile was a dangerous agency, and it was held that an owner was not liable for an accident resulting from its negligent operation by a conscious person who had reached the age of discretion, who took the car from the garage where the owner had left it, without the latter's knowledge.[28]

So in another case where it was alleged that the defendant owned an automobile capable of being run at a speed of 60 miles an hour on the highway and that he negligently consented and allowed it to be run along the highway at a speed of 60 miles an hour by an inexperienced person, by reason of which it ran over and injured the plaintiff, it was held that no cause of action was stated, the court remarking that the count was apparently based upon the erroneous assumption that because the defendant loaned his automobile to someone over whom he had no direction or control at the time of the accident, he should be held liable for the mere loaning, but that no liability attached to him by reason of this fact, unless it was being used in the owner's business at the time of the accident.[29]

In some cases the view has been taken that an automobile, although not a dangerous instrumentality *per se*, has such propensities for doing damage when carelessly operated that the owner may become liable in case he intrusts it to an incompetent person.

In one of such cases it was held that the training needed for the operation of automobiles should impose upon owners a special degree of care in the selection of drivers, but that no liability attaches to them for an injury which occurs while it is being operated by another on the ground of dangerous agency, where the one to whom it is intrusted is competent.[30]

In another case where a recovery was sought against the owner for an injury inflicted while it was being used by his son with the owner's consent, the evidence, which among other things showed that the operator was but sixteen years old, was held to support a charge that the owner of the machine negligently suffered it to be operated by an incompetent driver, and thereby converted it into a dangerous instrumentality.[31]

It was held in this case, however, to be reversible error for the court to instruct that an automobile "when run upon the public highway is considered a dangerous appliance as a matter of law."

In a Tennessee case the court stated

[25] Reichardt v. Shard, 30 Times L. R. 81.

[26] Collard v. Beach, 81 App. Div. 582, 81 N. Y. Supp. 619.

[27] Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096; McNeal v. McKain, 33 Okla. 449, 126 Pac. 742, 41 L.R.A.(N.S.) 775.

[28] Lewis v. Amorous, 3 Ga. App. 50, 59 S. E. 338.

[29] Doran v. Thomsen, 74 N. J. L. 445, 66 Atl. 897.

[30] Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L.R.A.(N.S.) 87.

[31] Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351.

that, although automobiles are not dangerous agencies in such a sense as to make the owners absolutely responsible for all damage occasioned by collision in whosever hands they may be, yet in view of their propensities the most stringent regulations should be applied, and that a very high degree of responsibility rests upon owners, both as to their operation and in the selection of parties to whom they intrust them. The owner in this case was held liable, on the ground of agency, for an injury inflicted while his car was being operated by his son for the latter's pleasure, with the father's consent.[32]

In another case involving the liability of an owner of an automobile for an injury resulting while it was being operated by his eleven-year-old son, the court stated that an automobile is not a dangerous appliance as a matter of law, but that they were not willing to hold that a powerful, heavy machine, such as the one in question, in the hands of an eighty-five-pound boy not yet in his teens, speeding along the streets of a populous and busy town, might not become a menace to the lives of persons on the street.[33]

The evidence in this case was held sufficient to support a finding that the boy was incompetent to operate such a car.

Summary.

To summarize, it may be stated that recovery has been sought against the owner of an automobile for injuries occurring while it was being used by a member of his family, both on the ground of *respondeat superior*, and also on the theory of dangerous agency.

It appears that while the relation of parent and child will not render the parent liable for the child's negligent operation of the car, yet that the child may become the parent's servant under certain conditions so that liability will attach to the latter for the negligent operation of the car by his child.

It seems that where a child acts as the chauffeur for the family, of a car kept for family purposes, the owner will generally be held liable for injuries resulting from the negligent operation of the car by the child while he is driving it for other members of the owner's family who have permission to use it.

It appears, however, that where a child or a member of the owner's family at the time an injury occurs is driving the car for his or her own purposes, the owner will not as a rule be liable, although the Missouri court of appeals in some cases has taken the view that a parent may be held liable under such circumstances if the car was one which was kept for general family use, upon the theory that it was being used by the owner's agent for one of the purposes for which it was kept by him.

In case the owner of a car kept for family use furnishes a chauffeur, other than a member of his family, he is ordinarily liable for an injury occurring while the chauffeur is driving the car under orders of some member of the owner's family.

Concerning the owner's liability on the ground of dangerous agency, it may be briefly stated that an automobile is not a dangerous instrumentality, and that the owner of such a machine cannot be held liable on this ground for an injury which occurs while it is being used by a member of his family. Some cases, however, because of the dangerous propensities of such machines, have held that the owner may become liable in case he intrusts his car to a member of his family who is incompetent to operate it, and an injury results by reason of his act in allowing such a person to control its movements. It may be added that the reasoning in this latter class of cases appears to be sound, and that in all probability liability upon this ground will be broadened rather than restricted.

[32] Lynde v. Browning, 2 Tenn. C. C. A. 262.
[33] Allen v. Bland, — Tex. Civ. App. —, 168 S. W. 35.

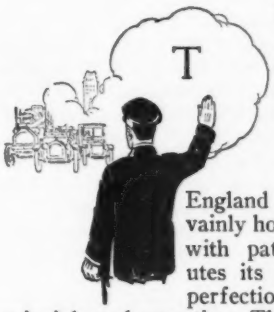
Joseph T. Woodson

An Efficient Judicial System

BY THOMAS W. SHELTON

Of the Norfolk (Va.) Bar

[Ed. Note—We are indebted to the courtesy of Mr. Shelton and of the Mississippi State Bar Association for permission to publish this extract from the annual address delivered before that body by Mr. Shelton on May 25, 1915. The earlier part of the address, delineating the contest between Moral and Jural Law, appeared in the July Case and Comment.]



THERE are many able lawyers who still cling to the common-law procedure of England because they vainly hope to mitigate with patchwork statutes its conceded imperfections in both principle and operation. The Code pleader horrified by the multiplication of minute, inconsistent, and inelastic statutory regulations of the courts, takes exactly the opposite view, and suggests that the legislatures may some time *stop* adding to it. So it is seen that one group wants to continue legislation, while the other group wants to stop it. Manifestly their destiny is exactly the same,—a vast crazy-quilt patchwork of unrelated, rigid statutes that tie the hands of the judge, that set the lawyer against him, and that thwart, instead of facilitating, justice. Virginia, the mother of common-law procedure modified by statute, and New York, the mother of Code pleading wholly made by statute, have both unanimously renounced and denounced their evil offspring, and are arranging to authorize their respective supreme courts to prepare and to put into effect and to improve, from time to time, a complete, correlated, scientific system of rules for the regulation of trial courts.

The Proposed New System.

This system of rules lies midway between the two systems of procedure that have been in vogue in this country. It will eventually take its place in jurisprudence under a suitable designation. Once in operation in the Federal courts, it will supply a model form to be adopted by the states, and thus bring about uniformity among Federal and state courts, a thing that conformity (§ 917, Rev. Stat.) has never done and was never intended by Congress to do.

The business men of this country have determined to do away with that delusion and snare at any cost, without reference to the other great possibilities of uniformity and modernization, and the co-ordination and co-operation of the Bench and Bar, which are now hostile. Inevitably, this program leads to interstate judicial relations as fixed as interstate commercial relations, the one made so by organic law, and the other by commercial necessity, unselfish patriotism, and love of the general welfare.

Judicial procedure, throttled by an obstinate Congress, has been outstripped by commerce a hundred years. Like the old man of the sea, Congress sits astride of and holds it back. Let procedure be reformed completely and scientifically and nationally, so as to meet the growing demands of a great interstate commerce. All but Florida, Maryland, Michigan, Mississippi, Illinois, Virginia, and West Virginia have abandoned the anachronism of common-law pleading; the other states are merely piling up statutory rules to suit the individual legislative fancy. There is no principle involved.

Statistics Showing over Fifty Per Cent Inefficiency.

Let us review a few practical results that in themselves sufficiently condemn present procedural conditions. In the year 1893, in 13,930 civil cases tried by

the appellate courts for a given period, 14,447, or over 48 per cent, of the points decided concerned practice alone, and never touched the merits. In January, February, and March, 1910, out of a total of 5,927 cases tried, 22,988 points were considered. Of these 12,259 involved points of practice, which means that 53.32 per cent of the time of the courts was actually thrown away in ascertaining whether the machinery of the courts had been used in the exact technical manner prescribed by Congress and the legislatures. It was an increase of 5.07 per cent over the previous year. The Mississippi court, during these three months, in deciding 56 cases, passed upon 97 points, of which 52 were questions of practice, which is 53.6 per cent of practice, and an increase of 10.6 per cent. The Virginia court during the same period in deciding 50 cases passed upon 244 points, of which 137 were questions of practice, a proportion of 56.1 per cent, and an increase of 4.1 per cent. During the same period the New York court in deciding 888 cases passed upon 2,855 points; 1,453 were questions of practice, a proportion of 51.2 per cent and an increase of 8.2 per cent. Could any business concern succeed with such a ratio of useless expense, and can the business men of this country afford to rest longer under this senseless and extravagant condition? But so much for the machinery of the courts. Let us consider their dockets.

The Federal Supreme Court Behind Its Docket.

At the beginning of the October term, 1904, of the Supreme Court of the United States, there were 282 cases brought over from the past term, and 400 new cases added, making a total of 682 cases. Of these, 402 cases were disposed of during the term, leaving untouched 280, or just 2 cases less than that with which it started the term. Passing over the eight intervening years, it found awaiting it in October, 1913, a docket of 604 cases carried over from 1912, to which was added 524 new cases, making a total of 1,128. The court was able by the hardest work ever performed by any group of men to dispose of 593 cases, leaving 535 on the docket to be carried over to further crowd the October, 1914, docket. The number of cases disposed of in 1913 was nearly double the entire docket of the year 1904, and reflects the increase in litigation in the Federal Supreme Court. Much of this is epoch-making and calls for the supreme genius, learning, patience, research, deliberation, and physical power possessed by these great and able jurists. The court's annual average for ten years has been 463 cases, and about 550 is the present annual addition of new cases. Assuming that the court will average 600 cases a year, and that 550 new cases will be added, there will be an annual gain of 50 cases on the docket. At that rate, it would be able to catch up with its docket on the 1st day of October, 1925. But one must not be unmindful that either side may now invoke the aid of the court in constitutional matters. (Atty. Gen.'s Report 1914, p. 56.)

President Taft's Recommendations.

The solution of the trouble is not so difficult if Congress can be induced to act. President Taft recommended that there should be taken away from the Supreme Court all questions which do not involve as a genuine issue the construction of the Constitution, and by limiting the duty of the court to hear any other cases than those which upon a writ of certiorari the court in its discretion draws to its jurisdiction. Appeals from the island territories could be divided between two circuit courts of appeals,—one on the Pacific and one on the Atlantic. There are meritorious bills pending in Congress that tend to restrict the right of appeal in copyright and bankrupt cases except upon certiorari. These will considerably shorten the docket and assure justifiable hearings. There are other bills for the reduction of costs.

An Appreciation of the Supreme Court.

Is Congress fully sensible of the country's obligation to the Supreme Court and the earnest desire to sustain and preserve it in its glory and power? It is the one stable element in the composition of the government. The manner of doing things changes, but principles live

forever. That is the secret of the strength of this Republic. No political storm can sway it from its course, for there is a pilot at the helm. The Supreme Court nurtured the nation in its infancy, trained it in its youth, and is now guiding it in the straight and narrow way in its maturity. It has been to the nation a pillar of fire by night; it has guided destructive revolutionary doctrines into beneficial evolutions; the violence of anarchy and the persuasiveness of the demagogue have fitted themselves into the constitutional mold; the oppression of concentrated power and the chicanery of corrupt organizations have ceased to trouble and alarm, at its simple word. It is the final arbiter between man and his brother, the State and the Church, the citizen and the soldier, between political parties, and even between Congress and the Chief Executive himself. There abides in the people of the United States a sublime faith in their highest tribunal, that makes of submission the noblest attribute of national character. Could a greater calamity befall the nation than a weakening of its beneficent power and the faith of a grateful people?

Inferior Federal Courts.

In the inferior courts the condition of business is more or less congested, in all parts of the country. This is particularly true in the second, fifth, eighth, and ninth circuits. In the entire Federal system of nine circuits there are thirty-two circuits, and ninety-four district judges. Several circuit and district judges are not physically capable of doing anything like full work.

The Solution Is the Assignment of Judges.

Eight of the thirty-two circuit judges and six of the district judges are over the age of sixty-seven. Now, putting aside all other thoughts, one would fancy that if Congress felt disinclined to retire these judges or to provide assistants, it would relieve the congested districts by assigning judges from other districts possessing light dockets. This possesses the merit of good business, since the congestion in any circuit could be obviated without the necessity of appointing additional judges, and full time thus would be had from serviceable judges without additional salary expense. So, economy was not the motive for congressional inaction. Just what perversity caused the 63d Congress (chap. 48, p. 203, 1st Sess. 63d Cong.), to allow this to be done nowhere except in New York (second district) the Credit Men's Association of America is trying to ascertain. Certainly, what is good policy for the second circuit ought to be good policy for the rest of the country!

An Elastic Judicial System Needed.

Manifestly, the whole judicial system must and will be made as elastic as possible, and both circuit and district judges become subject to assignment outside of their respective circuits. This will serve the further purpose of a model system that will eventually be followed by the states, for we are entering upon an era of reason in the law and its enforcement, and the yielding of Congress is inevitable. As it is, a circuit judge cannot sit outside of his circuit, with the exception of the second circuit, and district judges, while subject to assignment in their own circuits, cannot be assigned outside, except in a very limited class of cases, and as to the second circuit. Senator Smith, of Georgia, introduced a bill (Senate Bill 7041) in the last Congress looking to the amendment of § 260, Rev. Stat. which would have gone a long way towards granting relief, but Congress did not act. A deferred decision is oftener a worse evil than a wrong one, and the certainty of prompt decisions would prevent nearly half the present litigation.

The Spawning of Laws and Decision.

But if Congress and the legislatures cannot find time and disposition to relieve the judicial department, it undoubtedly found time to burden it. During the past five years, and not including 1914, as many as 62,014 public statutes were enacted. During the last session of Congress 700 laws were enacted and about 3,000 measures introduced. During the same period, 630 volumes of law reports were published, not including

those of the Interstate Commerce Commission. The Federal Trade Commission will soon commence to add to the number. In one day in 1914 the Federal Supreme Court handed down sufficient opinions to fill a volume. Two small volumes hold the life's work of John Marshall!

The Passing of an Old Regime.

Yet with this phenomenal increase in statutes and litigation, there ought now to be few judicial evils, with a proper personnel, an elastic system of assignments, and a modernized procedure. A Federal court *régime,* that need not be characterized, is passing. So, the necessary reforms ought not to be difficult of achievement by an organized bar with the aid of such an intelligent and unpartisan sentiment as is now supporting it. There is a fixed conviction that politics have no respectable place in the judicial department of government. A political appointment upon the bench is the lowest order of treason. Public sentiment is turning to the defeat of the offending appointing power, instead of the recall of his incompetent creatures. The public has learned more about the workings of the judicial department, and of certain distinctions that should be drawn, during the past six years than during the previous years of the national life. This country, and the South in particular, after resignedly struggling for fifty years under some unsympathetic Federal judges, after, in many instances, helplessly observing the squandering of the assets of litigants, suddenly realized that a voluntary and unexpected Moses had set their faces once more towards the promised land of their fathers. This one man did more and sacrificed more to destroy the evil and to fix for the Federal bench a new and high standard for the future than any other, living or dead. At a time when he was storm-tossed and threatened; when it lay in his executive power to propitiate selfish enemies and purchase political peace; when he saw perishing the highest ambition that any man can cherish,—President Taft clung steadfast to his own high ideals and the noblest traditions of the South, defied the group of grasping politicians that had long enough fouled their own native land, and refused to prostitute the Federal bench. The time is coming when a grateful South will prove as big and as generous and noble as he, and, rising above the fog of political partisanry into the pure, clear air of unselfish patriotism, will suitably perpetuate a memory respected by all lovers of law.

Relieve Judges of Administrative Duties.

Since the beginning of the world, the power to appoint to office has contained the germ of dissatisfaction and ofttimes destruction. In Genesis (41:13) it is said: "*Me,* he restored unto mine office, and *him,* he hanged." Jefferson declared that every political appointment brought him more enemies than friends. President Wilson's wholesome declaration that the time of the Chief Executive should be otherwise employed is fresh in your minds. How much more important is it that the judges should be free from this vexing conflict and burden, from the political intrigues leading to selections, and from the partisan spirit and power that is its concomitant. Yet it has become common for legislatures to create offices to be filled by judges. The recommendation of President Taft that Federal judges be deprived of the power of naming court clerks and receivers and fixing honorariums has long been approved by the leaders of the bar and is taking a strong hold upon the public. District Judge Rose, of Baltimore, one of the new *régime,* has consistently required a bill of particulars of the service claimed, and the approval of all fee allowances by two disinterested lawyers. Relief from administrative duties is a removal from temptation and cause for criticism.

A Distinct Commercial Law.

The prediction is made that Montesquieu's theory of differentiating the enforcement of commercial law will eventually prevail in practical America. Dividing litigation into two classes, he said:

"The affairs of commerce are but little susceptible of formalities. They are the actions of a day, and are every day followed by others of the same nature.

Hence it becomes necessary that every day they should be decided. It is otherwise with those actions of life which have a principal influence on futurity, but rarely happen." Spirit of the Laws, Bd. 20, chap. 18.

Such of you as believe that facility in commercial litigation has characterized the administration of the common law will do well to disillusion yourself with the assistance of Coke (pt. 4, chap. 60) and Blackstone (Com. bk. 3, chap. 4, p. 32; 88 Vic. 1844). Usurpation by the King's Bench has produced destruction of its simplicity and economy, and enveloped its enforcement in the mystery of technical procedure and the cost of delay. The law merchant has been gradually drawn into the channels of general litigation, when it would have been better administered under the theory of the courts of Piepoudre or "Piepowder," so called by Coke because "Justice is there done as speedily as dust can fall from the foot." It is based upon the same principle that justice was administered among the Jews in the gate of the city, and the attendant publicity. The story, reason, and operation of those simple forums supply, in a degree, a *raison dêtre* for the grander and more dignified twentieth century "Federal Trade Commission." Jenks, Short History of English Law, pp. 40, 75; "Select Cases of the Law Merchant," Selden Society.

Economizing the Time of Jurymen.

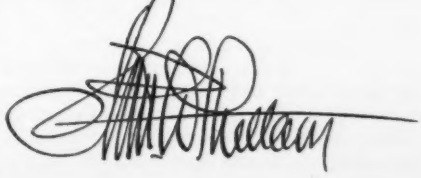
The difficulty in obtaining a proper personnel for jury service is not caused so much by the time of the citizen that is consumed as the time that is wasted while legal points are being discussed. The most of these would become evident and be settled before the trial begins if the pleadings made up exact issues of fact followed by (1) a complete denial, (2) a modified denial, or (3) an admission, instead of presumptions of fact and law. The difficulties of relevancy and materiality and length of testimony would also be decreased if not obviated, and an intelligent verdict would be more certain.

The Mechanics of the Law.

But how about the mechanics of the law? and we shall consider seriously only the Federal Congress, and that as to one instance. That is quite enough. It might well have been the Federal Supreme Court instead of Job who cried out in his travail, "Who is this that wrappeth up sentences in unskilled words!" In a very recent case (United States use of Alexander Bryant Co. v. New York Steam Fitting Co.—Dec. 7th, 1914, 235 U. S. 327, 59 L. ed. —, 35 Sup. Ct. Rep. 108) it casually remarked of the public contract statute," that "the act of Congress is undoubtedly ambiguous. Indeed, considering the letter, only, of the three provisos with which we are concerned, they absolutely repel accommodation. . . . We must try, however, to give coherence to them, and accomplish the intention of Congress." The court quoted another sentence, and declared that "this seemingly brings us to an impasse," and then resignedly concluded: "We can only select those which we consider the fittest to prevail to accomplish the purposes of the statute." And so by these means the judicial department assisted Congress to conduct the legislative department, and the Constitution was saved! Is there anything more obvious than the necessity for a congressional reference bureau presided over by some capable, deliberate, and profoundly educated thinker?

When Law Shall Be a Science.

But let us turn from these troubling thoughts to the beautiful vision of Dean Lile, of the University of Virginia, "when law shall be a science and justice a certain measure." What higher ideal could be held up to the student and the lawyer, alike, than the belief that the judicial department of our government can be modernized, perfected, and operated through the co-operation and coordination of the bench and bar so as to command the loving and dutiful respect of every law-abiding citizen?



Historical Review of the Office of Sheriff in America

BY BENJAMIN M. DAY

of the New York Bar

WITH the founding of the English colonies in America, and the immigration in large numbers from the old world to the new, governmental problems loomed large in the minds of the early settlers. The reasons for colonization and discovery, together with the natural instincts and desires of the colonists, were at once evident and easily discernible in the type of government founded and the degree of stringency of the laws enacted.

The English system was, of course, the model on which all the colonies were governed, but the model was followed so far, and so far only, as the tastes of the people dictated and the forced relationship between the colonies and the mother country made necessary. Virginia, with her aristocratic tendencies and her body of loyal members of the Church of England, followed more closely than any other colony in the governmental footsteps of England; while New England, with her spirit of reform and revolt, of democracy and freedom, wandered away as far as she dared from the accustomed paths, and instituted governmental experiments, which heretofore had been looked upon as wild and visionary by all but the most pronounced idealists.

The unit of government in the colonies of the North and of the South differed in much the same degree as did the underlying principles of administration. The colonists in New England were wont to settle in towns and villages, partly because of a rather harsh climate, partly because of purposes of offense and defense in their relations with the Indians, but mainly because of their prime purpose to gather together in a close compact all of like faith and ideas, and by hearty co-operation and endeavor to bring into fulfilment their dreams and aspirations for religious and governmental toleration. The settlers in Virginia, however, coming as they did, in great numbers, from large estates at home, and not feeling the necessity for such close contact with each other, at once settled on large estates or plantations, which mode of living was encouraged by both soil and climate. In this way the county became the important governmental unit, and bore very much the same relation to the Virginia colonists as did the town to the settlers of New England.

Upon the division of the colony of Virginia into shires or counties in the year 1634, the colonial administration of the colony became permanently established. Among the other county offices provided for was the sheriff, upon whom was imposed the added function of collector and treasurer, making him, as was his prototype in England, an official of important and varied duties. The lack of the spirit of democracy and the fondness for home traditions in Virginia was plainly seen from the method chosen of electing the sheriff and other county officials. Instead of being elected by the colonists themselves, he was appointed by the governor of the colony on the recommendation of the justices, who were a body of wealthy and aristocratic planters practically controlling the government of the shire.

While the town was the most important and earliest development in New England government, the county finally came to be considered, and was first

formed in Massachusetts in 1636. Among the first county officers provided for, the sheriff is missing, and his office was not created until after 1654; and under the provisional charter of 1691 it was provided that he should be appointed by the governor or general court; this notwithstanding the fact that some of the other county officers were elected by the people, subject to the approval of those in authority. A kind of election which would hardly find favor to-day, but a more democratic method than that employed in Virginia.

The county as a basis of government was a later development in New York than elsewhere, largely because of the fact that the English influence was not introduced into the colony until many years after its permanent establishment. The Dutch ways and traditions, of course, were at first the governing ones, and it was not until after the English conquest of New Netherlands, that the counties were formed. In 1683, however, county government became firmly established in New York, for then the colony was formally divided into ten counties, with the various county officers modeled after the English system. Here we find the sheriff's office first completely organized, and the system started, which, with modifications and alterations, has lasted down to the present time.

We thus see that during colonial times, with the development of the county, the sheriff came to be recognized as an important and necessary county official, with powers large and varied, but with no direct responsibility to the people he served, but rather to the few in authority during whose pleasure he held office.

After the English conquest of what is now New York became an undisputed fact, the colony prospered and grew until it was soon recognized by the home government as the choice portion of the American colonies. The harbor of the city of New York, unrivaled in its extent and beauty by any in the colonies, was soon the main point of arrival and departure of vessels from Europe, and the city, although for many years destined to yield to its rival Philadelphia as the most populous city of the colonies, was seen to be, because of its position at the mouth of the Hudson, a place of great strategic importance.

The whole colony shared the prosperity of the city, the Hudson valley became dotted with towns and hamlets, and the fertile plains and valleys west of the Hudson soon did their share in the development of the commonwealth. As the population increased, counties also increased in size and number, and the importance of the sheriff as an official kept pace with the growth of the domain over which he held sway.

While the spirit of liberty and of popular rights held undisputed sway and achieved its signal triumph over the forces of monarchy in 1776, and was later made substantial and permanent in New York state by the adoption at Kingston of its first Constitution, in 1777, the minds of the law framers of the new state were not blinded by the popular passion, and heeded the saner counsels of the few, in refraining from giving too great power at once to the people at large. Thus we find in the initial Constitution the salutary provision that the sheriff shall be annually appointed, that no person shall hold the office for more than four successive years, and that the occupant shall be barred from holding any other office at the same time. Here we see a method of selection established, which, while perhaps not popular with the pronounced democrats of the day, was sound in principle, and reflected the thought and opinion of the better and more substantial element in the community.

One of the first matters which the legislature of the newly established state of New York had to consider was the abuse of the mileage fee system in the office of sheriff. As the temptation then was great for the sheriff to compute his mileage for the service of writs and process from the farthest point possible from the place where his service was to be made, it became necessary to specify in detail and beyond question of dispute the exact place from which the computation was to be made. We find this done with extreme accuracy by the legislature during the first term of its existence, by act of March 19th, 1778.

That the sheriff was regarded at once

by the legislature as the important peace officer of the county is evidenced by the fact that in 1783, in the act passed to prevent private lotteries in the state, its enforcement was intrusted to the mayor, and the police officials of the city, and to the sheriff of the county. The means of enforcement at his disposal were not specified, but it is plain that his common-law rights and privileges along those lines were recognized.

The collection and expenditure of the fines and forfeitures collected throughout the state was another question which was soon brought to the attention of, and legislated upon by, the lawmakers of the state, then in session at New York city. By the act of February 9th, 1786, a system of accounting was ordained whereby the sheriff, among other officers, was compelled once during the year to account to the court of exchequer for all fines, forfeitures, etc., collected by him. He was compelled to pay at once any balance found due by him to the clerk of the exchequer court, and upon his failure to make such accounting he was liable for all such sums as should or might have been received by him. This legislation was much needed, and went a long way toward the elimination of opportunities for excessive receipts and disproportionate returns by the sheriff. The court of the exchequer in these cases was held by the junior justice of the supreme court, and the idea was, of course, borrowed from the English judicial system. By an act passed a few days later, the sheriff was allowed to account at his option on either one of two days during the year.

In an act passed in 1786 the trials of issues in the supreme court, and the returning of able and sufficient jurors were defined at some length. The sheriff was instructed to make his return to the circuit court, and his duties in regard to impaneling juries, in respect to the number of days before trial that they were to be summoned, and the number of men to be notified, etc., was gone into with considerable detail. Each sheriff was also instructed to make up at his own expense a list of all the freeholders in his bailiwick, who were qualified to serve as jurors, but under ordinary circumstances no man could be summoned twice in the same year to act as juror.

The reluctance to attend jury duty, and the inability, intentional or otherwise, of many citizens to appreciate their sacred obligation to the state in this respect, were apparently as common and vicious in the latter part of the eighteenth century as they unfortunately are in these later times. We cannot boast a truly efficient citizenship until each man is willing to give up some of his time in order that the rights of his fellows may be properly safeguarded. The act of 1786 further provided that no sheriff should accept any reward, of money or otherwise, for excusing a juror who was properly qualified to serve, upon pain of severe penalty.

When in 1787 the legislature passed an act stating in what actions a body process might be issued, and also regulating outlawries arising therefrom, the importance in which the sheriff was held as the leading county officer was made evident. It was stated that each sheriff, either in person or by his deputy, must twice a month hold a court, called the sheriff's county court, for the purpose of demanding persons against whom body processes had been issued, or to give judgment of outlawry in regard to the same. The general election law of the same year also gave recognition to the sheriff as the chief officer of the county, for by it the clerk of the senate was instructed to send to the sheriffs of the several counties a list of the names of the senators whose seats were to become vacant at the end of the year, and to the sheriff in turn was delegated the duty of transmitting to the various election inspectors a copy of the notice received by him. Thus the responsibility for the proper distribution of this intelligence throughout the county was lodged with the sheriff. He was further charged, however, with the duty of receiving from the inspectors of election the ballot boxes collected throughout the county, and, after sealing them with his official seal, to transmit them unharmed to the office of the secretary of state. This duty placed upon him carried with it innumerable opportunities and temptations to fraud of various kinds, which

temptations and opportunities were hardly eliminated by the further provision that the penalty for the neglect or misbehavior of the duties assigned should be a fine of £200.

By the act for the better apprehending of felons, February 14, 1787, reference is made, though not by name, to the *posse commitatus,* or power of the county of the sheriff, although it seems to be enlarged to extend to other officials as well. In this act it is stated that all men must be ready and armed at the command of the sheriff to pursue and arrest felons, whenever the occasion so warranted. If we may judge by the severity of punishment in case of neglect, wilful or otherwise, of his duties, the sheriff's functions as a peace officer were judged of far greater importance than were his largely ministerial functions in regard to elections. If he should fail for any reason to properly apprehend a felon, his punishment was both fine and imprisonment, resulting, of course, in the loss of his position and standing in the community. The vast change in the population of the state and the mode of living of its citizens in the past century and a quarter is delightfully illustrated by the first sentence of the felon's act, which states that when any felony is committed, a hue and cry thereof shall be immediately raised in the market places of the town where the crime was committed, so that no man may be in ignorance of the act and fail to do his share in bringing about the arrest of the offender. Such language would sound strange indeed to the lawmakers of the present day.

It soon became evident that, owing to the diversity and importance of the sheriff's duties, the English rule that he must be a man of means and standing in the community would have to be incorporated in the state law, and accordingly in 1787 the legislature passed an act which required the sheriff to be a substantial freeholder in the county where he was to hold office. Although the term "substantial freeholder" would today be regarded as highly indefinite, it seemed sufficient at that time to impress upon the community the kind of man required for the shrievalty. This act also provided that the care and custody of the jails throughout the state should be in the hands of the sheriff, he being authorized to employ such numbers of keepers as would be necessary for the proper maintenance of the jail. Prisoners taken by constables and other peace officers were in turn delivered to the sheriff for him to safely keep in prison. By this same act the sheriff is prevented from taking excessive fees, and safeguards are provided to prevent as nearly as possible this from being done. Reference is here again made to the power of the county of the sheriff, and anyone who unlawfully resists his command to aid in preserving peace or apprehending felons may be, upon conviction, both fined and imprisoned.

The extreme care which our law has always taken to protect innocent parties and to keep inviolate the right to private property is well illustrated by a further enactment of the law of 1787, which provided that no sheriff or other person should seize the goods of one arrested for suspicion of felony, before that person be convicted according to law, except, of course, his goods be otherwise lawfully forfeited. This rule was to be enforced under pain of severe penalty for its infringement. The principle that the welfare of the people is best safeguarded when the rights to private property are made secure was thus early recognized by the legislature of our state.

The pre-eminence and authority of the sheriff as a peace officer was recognized by the United States government itself, for, doubtless subject to its desire, the legislature enacted in 1790 that all Federal prisoners should be safely kept by the sheriff in his own "gaol," though of course their maintenance was to be supplied by the government.

As the first Constitution of the state ordained that the sheriff should be annually appointed, and should not hold office for more than four successive years, considerable discussion arose as to the legality of acts performed by the sheriff after the expiration of his legally appointed term and previous to the designation of his successor. Contingencies of this nature must have been of rather

frequent occurrence, for the legislature in 1795 passed an act stipulating that duties could be legally performed by the sheriff during the interval between the expiration of his stated term and the appointment of his successor. Apparently, as a gentle reminder, however, it was added that it was the duty of the person administering the government of the state, by and with the advice and consent of the council of appointment, to appoint sheriffs according to the Constitution.

As the population of the counties increased, and as, of course, the work of the sheriff's office proportionately increased, not only in volume but in importance, need was felt of some statutory enactment providing for someone who could in cases of necessity take the place of the sheriff. Here again our lawmakers turned to England for their guide, and the office of under-sheriff was sanctioned. Each sheriff as soon as possible was compelled to choose some proper person within the county to become his under-sheriff, who was to occupy the place of his chief when the occasion demanded. In addition to this, of course, the sheriff was at liberty to name as many deputies to aid him in the performance of his duties as in his judgment the occasion demanded.

In 1798 the legislature, by an act passed on February 24th of that year, provided that the sheriff of New York county, before assuming his duties, should give a bond to the state in the sum of $20,000, with at least two sureties bonded to the same amount, and that all other sheriffs within the state should enter into a bond to the extent of $5,000, and likewise have two sureties, all the bonds to be filed in the office of the county clerk of the respective counties. So vital was the necessity for a sheriff to give the bond prescribed that if he failed to do so for the space of twenty days after receiving notice of his appointment, he was deemed to have refused to accept the office offered to him.

We have thus seen, in bare outline, how the shrievalty here in the state of New York, came to be regarded as an office of importance and honor; how the office, with all its powers and duties, was, as it were, transplanted from the mother country to the new world and instituted here, with only such changes as were made necessary by the altered conditions and circumstances with which it had to deal. That the method of selection since changed, giving the choice of the sheriff directly to the electors of the county, has resulted in the lowering of the standards of the office, is beyond question.

So to-day when we are being brought to a realization of the fact that good government is not likely to be achieved by giving to the people the direct choice of all their officials, but that governmental efficiency is fostered by making few officers elective and many appointive, may we, in looking back over the history of the state, catch a fresh inspiration from the wisdom of the fathers, and realize that they had the true insight into the efficiency of the office of sheriff when they made that official appointive, and not elective.

Benj. N. Day

This Way Out!

BY REYNELLE G. E. CORNISH

Of the Portland (Ore.) Bar

THREE rings meant good news from the office! The Silent Partner reached the front door in record time. "Guess!" demanded the husband of the Silent Partner, trying to make his tone nonchalant. Downtown, he was still an S. Y. L., which, everyone knows, stands for Struggling Young Lawyer; but within the sheltering four walls of his domicil he was, already, a Prominent Attorney, and conducted himself accordingly.

The Silent Partner had her guess ready. "Somerfield, Drescher, & Company have retained you as their attorney," she ventured, with the promptness of long practice.

The Prominent Attorney laughed. "You are wrong, again! They haven't retained me, but they have given me a note for fourteen hundred dollars to collect, with the promise of more, if I make good."

"Hurrah for our side!" applauded the Silent Partner happily. "I knew it was coming!"

Over the dinner table they discussed the good fortune, with all its possibilities.

"He is queer," commented Dowling, thoughtfully, "and snappy; but I think he hides a twinkle in those grim eyes, and they say if you make good with him once, you are in solid. I gather he is much dissatisfied with his present attorneys, and is looking for a change, so it may mean our chance. This is such a simple matter (a mere collection) that we can't go wrong on it."

The Silent Partner lifted her coffee cup with a perilous flourish. "Here's to our success!" she proclaimed, confidently.

The case of Somerfield, Drescher, & Company v. J. P. Meyers jogged on its uneventful way. The defendant did not even deign to put in an answer, and judgment by default was entered and docketed, without a ripple of excitement. Dowling promptly issued execution.

There was only one piece of property in the name of J. P. Meyers, but that was a valuable 50x100 piece, close to the heart of the downtown district. It was really apartment house property, and valuable as such, though there was only a small, unimportant house upon it, in which Meyers and his family resided. Two hours before the sheriff's sale Mr. J. P. Meyers roused himself from his lethargy of inaction, and claimed his exemption in the property, under the Oregon homestead laws.

"It's absurd," fumed Dowling helplessly. "That property is worth $5,000, and the exemption is limited to $1,500, but just because the property consists of only one lot, and Meyers is living in the old shack on it, he can claim it as a homestead. I have advised Somerfield, Drescher, & Company to buy up the exemption (they can release the property from the exemption claim by paying its cash value, $1,500, and it is well worth it in my estimation); but Somerfield refuses to bother with it. He just glared at me, and asked if my idea of collecting a fourteen-hundred-dollar note was to pay the other fellow fifteen hundred."

The Silent Partner was all sympathy. "Isn't there any way out?" she began, hopefully.

Dowling nodded. "Oh, of course," he admitted, "the lien is there, and when they sell the property, they will have to pay us off. But no one is buying real estate, even bargains, just now, and the first mortgage is almost due. From what I have heard of Meyers, he is just clever

enough to let it go to foreclosure, in order to shake off our lien, and then buy it in himself."

But the Silent Partner refused to consider this doleful prospect. "I don't believe he is going to think of that," she decided stubbornly. And it seemed that she was right, for the weeks marched stolidly past without any foreclosure papers being served, and in the press of work the Meyers matter was pigeonholed along with other affairs, awaiting developments.

Several months later, Dowling, running down the register at the office of the referee in bankruptcy, paused abruptly. The black lines of a familiar name wiggled before his dazed eyes,—Jacob P. Meyers—Dowling looked at the incomprehensible thing, stunned. Then he pulled himself together, and went after all the information he could obtain.

The matter was absurdly simple. J. P. Meyers had filed a voluntary petition in bankruptcy, March 1, 1914, and had been duly discharged May 2, 1914. Somerfield, Drescher, & Company were listed in the schedules, but had not appeared in the proceedings.

"The old fraud!" muttered Dowling. "Does he think he can put it over on us like that? We have never received any notification, that is certain!" Nevertheless, he carefully went over the budget of papers in the filing case, questioned the stenographer, and searched even the daily emptied waste basket to be sure that the notification had not, in some inexplicable way, escaped him. Then he rang up Somerfield, Drescher, & Company.

"Mr. Somerfield," he inquired. "Has your firm received any notification of the bankruptcy of J. P. Meyers?"

"What! What!"—snapped the impatient voice back. Dowling could imagine the beetling brows scowling into the phone. "Certainly not, certainly not!—Er, wait a moment. I will connect you with our credit man; he handles those matters."

The credit man's voice was smooth and suave.—Er, J. P. Meyers?—Er—No, he had no recollection of such a notice. But there was a click of indecision in his voice that caught Dowling's alert ear.

"Mr. Cass," he spoke decisively, "Jacob P. Meyers filed a petition in bankruptcy on March 1, 1914, and Somerfield, Drescher, & Company were listed among their creditors. Notice was certainly sent from the referee's office, and must have been received by someone at Somerfield, Drescher, & Company. I must have that notice in my office to-day, without fail. It is of the utmost importance."

Two hours later a clerk sauntered in with an envelop for Dowling. The attorney opened it grimly. There, somewhat the worse for wear, was the missing notice, inclosed with a scribbled note from the credit man. Dowling glanced over the conventional phrases,—"Sorry—error of clerk—notice mislaid—regretting the delay," with a black frown that would have done credit to old Somerfield himself; and his voice, as he called up the head of the firm, was hot.

When he finally paused for breath, there was a silence. The voice that came back to him, at length, was as cold and remote as a burnt-out furnace on a winter morning.

"I see," commented the sarcastic tones. "You tell me J. P. Meyers has gone bankrupt and been discharged without our doing anything? And the other creditors got 25 per cent you say. What? —You never received any notice!—error in this office,—eh!

"Well, er, Mr. Dowling, when we give a case to a lawyer to handle for us, we expect him to look after these little matters. We rather look for him to attend to things, and to see that a bankruptcy doesn't slip by without our knowing it. Good-day, sir."

Dowling swung the telephone slowly away. The absurdity of it! And yet, in some way, old Somerfield had definitely and autocratically saddled his attorney with all the blame, and left it there to sear his reputation for ability and trustworthiness. There seemed to be no way out of the tangle. Dowling asked the advice of the attorneys in the adjoining offices, both older men, but they shook their heads. A bankrupt is a bankrupt, Somerfield, Drescher, & Company had lost their rights through laches, and now the bankrupt was discharged from their debt. It was the simplest proposition in law. There was not even a divergence of

authority to furnish a foothold for a struggle.

The Struggling Young Lawyer looked at the clock wearily. He hated to go home that night.

The Silent Partner, like the good sport she was, pretended to be deceived by his simulated good spirits, and closed her lips against question. But after the fire had been lighted, and the most tired man in the world ensconced in the Sleepy Hollow chair, she curled up on the hassock at his feet.

"Tell me," she begged softly, "Am I not your very own partner?"

So Dowling told her, haltingly, "And there goes our chance with old Somerfield," he ended. "And all because of a hair-brained, addlepated old nincompoop that neither of us ever saw before!"

The fire flickered unsteadily, as if the chill wind of disappointment were discouraging even its cheerful flames.

"I don't believe it," argued the Silent Partner stubbornly. "There is surely a way out."

Under the little breeze of hope, the man in the Sleepy Hollow chair straightened. "Of course, there is a way out," he echoed cheerily, "and we are the ones to find it, Partner!"

The next day started the search. Dowling glanced keenly along the shelves of the well-stocked library. Somewhere between those silent, uncompromising covers lay the way out! But the first books he consulted refused to disclose the path. He looked his subject up under every conceivable heading, and viewed it from every angle for a new key word, without results. Just before noon he found a small signpost in L.R.A. "This way out," it seemed to say. Dowling drew a long breath, and set out, hotfooted, over the trail.

It was an exciting chase, in and out of elusive reports, over *dicta* and conflicting decisions, and cases that, deceitfully, by some quirk of facts, just missed being in point; but by late afternoon an informal brief, with the decisions upholding the signpost found in L.R.A., and completing the trail, had been thrown together, and the way out lay straight and clear. Dowling sternly repressed his impulse to call up Somerfield with the good news. "Watchful waiting is the cue here, my boy," he counseled his impatience, cautiously.

Meanwhile he scanned the real estate page of the papers carefully, each evening. Three weeks later he found what he was looking for.

"Here it is!" he exclaimed, "Now, we will give them just one week before the fireworks!"

The Silent Partner paused in her sewing. "What did you do to them, Edward," she asked interestedly.

Dowling chuckled. "Absolutely nothing," he answered, truthfully. "That is just the point!"

The first mild torpedo went off three days later. Dowling recognized the carefully modulated tones of one of the closing men at the Title Company. "Yes, Johnson," he answered affably, "What can I do for you?"

"Oh, it is just a matter of form," explained the Title man in his most unconcerned manner. "We are running down the title of some property that J. P. Meyers is under contract to sell to H. R. Condon, of Eugene, and we find that you hold a judgment on record against it. Of course the lien is void; wiped out by Meyers' subsequent bankruptcy, in which the referee set aside this property to the bankrupt, as a homestead, and Meyes's discharge is a matter of record; so I suppose we can pass it all right. But you know the Title Company like their things shipshape, and we suppose you have no objection, merely as a matter of form, to canceling this void judgment lien?"

Dowling smiled into the phone. "I'm sorry, Johnson," he stated, "but you are mistaken about that lien. It is just as good as the day it was docketed, or a little better, and it objects to being canceled."

"What!" came back the astonished voice. "Why, man, you are crazy! Wasn't your client listed in the schedules?"

"Yes," assented Dowling, patiently.

"And didn't they receive due notice?"

"Yes."

"Wasn't this property set aside to the bankrupt by the referee as a homestead

exemption; there wasn't any flaw there, was there?"

"Not that we know of."

"Doesn't a bankruptcy void all judgments docketed within four months?"

"Well, er, we wouldn't go quite so far as that."

"What! Oh, come off, Dowling. That is the first principle in bankruptcy law. Here, hold on,—I'll read it to you." Section 67 F of the bankruptcy act is as follows:

"'That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, etc.'"

"What's the answer to that?"

"Nothing," conceded Dowling, calmly, "It is all right so far as it goes. It just doesn't happen to apply to this case."

"What! Not apply to this case! Why doesn't it?"

"Well," said Dowling, "You are overlooking several things. For one, we didn't prove our claim."

"Didn't prove your claim! Oh fiddlesticks! you were in the schedules, and properly notified. Do you mean to say your debt wasn't wiped out by Meyers' discharge, just because you failed to prove your claim?—Why man, that is another primary principle of bankruptcy law. Here, wait, I'll read it to you."

"Never mind," "interrupted Dowling good naturedly, "I am rather busy this morning. We are not trying to revive any defunct debts; but that judgment lien is good, nevertheless, and don't you forget it, while you are passing on that title."

"But," persisted the baffled Title man desperately, "the bankruptcy law says."

"Yes," agreed Dowling, with polite weariness. "Nevertheless, that judgment lien is good. Just think it over, Johnson!"

Half an hour later a crumpled card was brought in to Dowling.

"Show Mr. Harris right in," directed the attorney for Somerfield, Drescher, & Company, genially. The torpedo had evidently set off a cannon cracker. "Ah, good morning, Mr. Harris. Be seated."

"Morning," grunted Mr. Harris breathlessly, plumping his hat unceremoniously down on the desk. "I represent J. P. Meyers. Johnson, of the Title Company, says you won't cancel that void lien on the Gleason street property. What's the matter?"

"Nothing at all," said Dowling gently. "It is a perfectly good lien."

"Good," snapped the other attorney, his fat face growing red. That's what Johnson said you claimed. What is the matter with you? Don't you know a bankruptcy wipes out all judgment liens acquired within four months?"

"Not this one," persisted Dowling calmly, "Not this one!"

"Huh! What special dispensation do you think you have?" The red face twisted into a sneer. "That's the trouble with you young attorneys; you think you can change the law to suit every case that you manage to get in your office. How are you going to enforce that judgment?"

"Well," admitted Dowling, wearily, "I am not trying to enforce it."

"So you admit you can't enforce it! and yet you won't take it off, shouted Mr. Harris, pounding his derby on the desk. "I'll appeal to the courts; they'll make you take it off! They'll—they'll—why your're in contempt of court! Yes, sir,—the bankruptcy court says that judgment is void, and you defy them. That's what it is,—contempt of court!"

Dowling could scarcely restrain a smile. "I hardly think you could call it a contempt of court," he suggested. "But you might try a suit to remove the cloud on title, if you really wanted to start anything."

The irate attorney flushed. "It's blackmail," he snarled viciously, "That's what it is!"

Dowling's eyes blazed, but he walked steadily past the brandishing fists to the door, and opened it.

"This way out, Mr. Harris," he announced in tones that brooked no delay.

When the fat figure, still trembling with rage, had flung itself through the doorway, Dowling opened the windows and aired the office.

The Title Company rang up several times that afternoon, but Dowling was too angry to give them more than laconic replies.

At ten o'clock the next morning a new voice took up the argument. "This is Judge Belcher, of Belcher, McDermott, & Snow. Mr. J. P. Meyers has asked me to look after the matter of his title closing this afternoon. There appears to be some difficulty over a lien you hold against the property." The courteous tones cooled Dowling's still smouldering wrath. "Suppose you inform us on your position in the matter, and possibly we may be able to reach some understanding. The closing is set for 2 P. M. this afternoon, and it is very important to put it through, if possible."

"Well," said Dowling frankly, "We consider that the lien we hold against No. 25 Gleason Street is good, in spite of the bankruptcy, and we have authorities to back up our point of view."

"I see," Judge Belcher was striving to keep the impatience out of his voice.

"You consider a judgment lien on the property of a debtor, docketed one month before bankruptcy, is good after the discharge of the bankrupt; and you say you have authorities? Is it your contention that your clients were not brought into the bankruptcy proceedings properly?"

"No," said Dowling. They were notified, but they did not prove their debt."

"I see," smiled Judge Belcher, relieved, "and you consider that a debtor can elect not to prove his debt in bankruptcy proceedings, and thus preserve his lien?"

"In this case, yes," assented the younger attorney. "I have prepared an informal brief, setting forth the authorities, if you care to examine it."

"I see," the courteous tones were faintly tinged with amusement. "That is very kind of you, Mr. Dowling. I am certainly interested in this exceedingly novel, I might almost say, revolutionary, theory of yours. I wonder if it would be imposing on your time to ask you to come to the closing at the Title Company at 2 o'clock. It will only be a few steps for you, and I am certain we can settle this matter in a short time. Your authorities can be examined in the Title Company's library, and if you can show us that you are right, my client will pay off your lien immediately."

"I will come gladly," agreed Dowling, promptly, "and if I am wrong we will release the lien we hold, at once.

"Good!" ejaculated Judge Belcher. "It looks as if this closing would go through this afternoon."

Dowling hung up the receiver slowly. Ex-Judge Belcher, for twelve years a Federal judge, and admittedly the finest bankruptcy lawyer west of the Rockies, had been frankly incredulous over Dowling's position. Could there be some absurd blunder in the authorities? He scanned his brief hastily and, reassured, strode over to the Title Company, with every outward appearance of calm.

Johnson grinned at him, across the littered table in the closing room. "Got the dope with you?" he inquired genially.

Harris and J. P. Meyers scowled gloomily from a corner, but Judge Belcher came forward and shook hands cordially.

"I am glad to meet you, Mr. Dowling," he said gravely. "We are all ready to close, as soon as this little matter of yours is adjusted."

Dowling fumbled for his brief in a momentary pause. "You see my point is,—er—this has not been squarely put up to the Oregon supreme court, but I am certain their decision would be with me —er—."

A quick smile flashed around the circle; even Judge Belcher relaxed. "Oh, you have no decisions! This is just your own opinion?" he began.

Dowling straightened up, his momentary trepidation gone. "I think that was an unfortunate beginning," he smiled back. "Suppose I make another start.

"On February 1, 1914, Somerfield, Drescher, & Company obtained a judgment by default against J. P. Meyers; the amount in round numbers was one thou-

sand four hundred dollars, and execution issued against the property known as No. 25 Gleason Street. Meyers claimed his homestead exemption, and the execution sale was halted. Am I correct so far?"

"Yes," murmured the circle around him.

"On March 1, 1914, J. P. Meyers filed a voluntary petition in bankruptcy. Somerfield, Drescher, & Company were scheduled among the creditors, and were notified of the proceedings, but did not prove their claim, or take any part in the proceedings. Are we agreed on those facts?"

The circle nodded.

"The referee in bankruptcy, on the bankrupt's application, set aside No. 25 Gleason street as exempt under the Oregon homestead laws; distributed the other assets, amounting to about two hundred and fifty dollars in cash, among the creditors who proved their claims, and, no objections being made to the application for the discharge of the bankrupt, on May 2, 1914, J. P. Meyers was duly discharged. Am I right so far?"

"Right," murmured the listening quartette, in unison.

"Now, we come to the question! Did the discharge in bankruptcy in this case nullify and discharge the said judgment, which had become a lien one month prior to the filing of the petition, so as to prevent its enforcement against the property, upon the sale of the said property by J. P. Meyers?

"The first point I want you to get is that this property was exempt only from sale on execution as long as the debtor claimed it as a homestead, but that it was not thereby rendered exempt from judgment liens. Read the act—"The homestead of any family shall be exempt from *judicial* sale for the satisfaction of any liability, etc." Oregon Laws 1893, p. 93; Mansfield v. Hill, 56 Or. 400, 107 Pac. 471, 108 Pac. 1007; Hansen v. Jones, 57 Or. 416, 109 Pac. 868. In other words, when the family ceases to dwell any longer on its homestead,—as in this case, where Meyers is selling to a third party,—the property ceases to be a homestead, and loses its right of exemption from judicial sale. This is apart from the bankruptcy question, now. Are we agreed so far?"

"I think so," nodded the Judge cautiously. The others were silent.

"Now," proceeded Dowling, "We come to the second point. The bankruptcy proceeding instituted by J. P. Meyers does *not* affect the judgment lien which my clients, Somerfield, Drescher, & Company, acquired against No. 25 Gleason street, although it was acquired less than two months before the filing of the petition in bankruptcy."

"What!" shouted Harris belligerently.

"Oh, nonsense!" scoffed Johnson.

"Why—why—that's what I did it for," expostulated Meyers feebly.

"Be silent, gentlemen," ordered Judge Belcher's cool voice." "Proceed, Mr. Dowling."

"Section 67 F of the bankruptcy act, after declaring that all levies, judgments, attachments, or other liens obtained within four months prior to the filing of a petition shall be null and void, declares that the property affected by such liens shall be deemed wholly discharged and released from same, and shall pass to the trustee as a part of the estate of the bankrupt. *It is clear that this section does not refer to liens upon exempted property, which does not pass to the trustee, as a part of the estate of the bankrupt, to be administered for the benefit of the creditors.* Exempted property is held by the bankrupt, subject to the laws of the state, entirely free from Federal interference. Powers Dry Goods Co. v. Nelson, 10 N. D. 580, 88 N. W. 703, 58 L.R.A. 770.

"In Bush v. Lester, 55 Ga. 579, the court held that a discharge in bankruptcy did not affect the prior lien of a judgment upon land set apart to the bankrupt as exempt, the creditor not having proved his debt, nor done anything to waive his lien or subject it to the jurisdiction of the bankruptcy court.

"In Re Snyder, 33 Am. Bankr. Rep. 311, the court, in construing section 67 F of the bankruptcy act, holds that this section applies, and is limited to the bankrupt estate. As to the exempt property, which is not administered as any portion of such bankrupt estate, the pro-

vision does not take effect. The bankruptcy court is, in any event, not concerned with it, after the same is set aside for the bankrupt."

"In the First National Bank v. ——."

"Hold on, for a moment!" interrupted Judge Belcher. "Let us have some of these references from the library."

"Here they are," continued Dowling.

"Note to John Leslie Paper Co. v. Wheeler, 42 L.R.A.(N.S.) 292, 296."

"First Nat. Bank of Sayre v. Bartlett, 21 Am. Bankr. Rep. 88, 35 Pa. Super. Ct. 593; McKenney v. Cheney, 11 Am. Bankr. Rep. 54, 118 Ga. 387, 45 S. E. 433; Groves v. Osburn, 46 Or. 173, 79 Pac. 500 (Oregon case); Lockwood v. Exchange Bank, 190 U. S. 294, 47 L. ed. 1061, 23 Sup. Ct. Rep. 751; Re Hatch, 4 Am. Bankr. Rep. 349; Re Ogilvie, 5 Am. Bankr. Rep. 374; Ingram v. Wilson, 60 C. C. A. 618, 125 Fed. 913; Bush v. Lester, 55 Ga. 579; Jackson v. Allen, 30 Ark. 110; Freeman, Judgm. § 337; Ward v. Huhn, 16 Minn. 159, Gil. 142; Robinson v. Wilson, 15 Kan. 595, 22 Am. Rep. 272.—Is that sufficient?"

"I imagine so," commented Judge Belcher, dryly, as the clerk deposited a pile of books on the desk, and departed for more. "May I look over that interesting brief of yours?"

A silence settled over the room, broken, now and then, by the murmur of voices, as references were verified. Dowling sat and looked out of the window, until the door slammed violently. Then he faced about. Harris had departed, angrily, one might gather from the expressive clump of his feet along the corridor, and Judge Belcher was standing.

"Mr. Dowling," the older attorney said simply, "I have advised my client to pay off this lien. If you will prepare a satisfaction, a check for the necessary amount will be drawn for you at once." Then he smiled. "We might take this up to the supreme court," he concluded, "but I am afraid we would only have our trip for our trouble. That was good work, my boy!"

Dowling, back in his own office again, reached for the telephone.

"Eh, what," rasped the answering voice. "What! You got the check,—in full! Who was it, you say? Judge Belcher! Old George Belcher—and you made him back down without even a fight! First time I ever knew that old scrapper to quit before the courts made him. Have you got that brief over there now? I'd like to drop in and see it,—if you are not too busy."

Dowling hung up the receiver contentedly. "I do believe my peppery client was actually humbled, for a moment," he commented in mild wonder.

"Ting-a-ling—ling—ting—a-ling—ling—ling," proclaimed the front door bell riotously that night.

The Silent Partner abandoned a fat chocolate cake on the perilous edge of the kitchen table, where it wavered back and forth like a black-faced comedian taking a curtain call.

"Guess," shouted the Prominent Attorney, gathering the excited little figure up in his arms.

"Mercy!" gasped the Silent Partner, abandoning her standard guess in the excitement, "A rich uncle has died and left you a fortune?"

"Wrong again," laughed the Prominent Attorney. "It is something much better than that. I collected the Meyer judgment in full to-day, and Somerfield, Drescher, & Company have retained me as their attorney, for the rest of my natural life."

Editorial Comment

Soon shall thy arm, unconquer'd steam! afar
Drag the slow barge, or drive the rapid car;
Or on wide-waving wings expanded bear
The flying chariot through the field of air.
—Erasmus Darwin (born 1731—died 1802.)

Case and Comment
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Motor Thieves

HUNDREDS of motor cars are stolen every year. Criminality, in this regard, seems to be on the increase. Automobiles are constantly left unguarded in the streets or at places of amusement. The value they represent, and their utility as a means of escape, make them an attractive prey to those who would live well at other's expense.

Nearly every machine stolen is dismantled and its parts replaced by the parts of other stolen automobiles, so as to make identification difficult. Yet in almost every case the thieves overlook some mark which enables the police to trace and recover the automobile and return it to its owner.

Automobile thieves, according to Detective William J. Gleason, of the Philadelphia automobile squad, travel in small bands, and every member of the band is an expert mechanician.

"The first step taken by an automobile thief after he has stolen a car," said Officer Gleason, to a representative of the North American, "is to file the numbers from the body of the car and from the engine. New numbers are restamped into the iron, and often it is so cleverly done that only experts can detect the fraud. Nearly every car has some mark or defect by which it may be identified by the owner. The thief looks for those things with a trained eye, and employs all of his ingenuity to eradicate them.

"The thief takes the lamps, windshield, hood, fender, engine and other parts and distributes them among other stolen cars. Frequently he will transfer the body of a car. When the changes have been made, a coat of paint is applied and the deception is complete. After the 'switching' process, the stolen car may be run by the owner every day in the year, and defy identification. Although most of the automobile thieves are expert mechanicians, very few, if any, of them have a thorough knowledge of an automobile. In every instance they overlook some mark by which a stolen car may be identified. These marks are made intentionally by the manufacturers, and their location placed in the hands of the police. That is why, no matter

how the parts of the automobile may be 'switched,' we can always find something by which the machine may be identified.

"Sometimes the thieves dispose of stolen cars to automobile 'fences,' but more frequently they prepare fake bills of sale and sell the machines to individuals or to second-hand dealers. Often the machines are driven out of town and sold in neighboring states. In these cases, the thieves do not take the trouble to 'switch' the parts, for they feel there is little danger of detection.

"There is another brand of automobile thief, known as the 'stripper.' The 'stripper' never runs the risk of selling a machine. He is clever enough to steal any car without a key, and after he has made a 'getaway' with a machine he strips it of its tires, tubes, lamps and other things of value and then abandons what is left of the automobile.

"Recently we caught one of the cleverest 'strippers' in the business. He was sentenced to serve two years in the Eastern Penitentiary. He would write to the various automobile factories in the country and inquire how the cars made by those factories could be operated to prevent thieves from stealing them. In that manner he collected inside information on all of the various makes, and being an expert mechanician, he had no trouble in 'getting away' with any car that suited his fancy. Before his arrest, he had stripped twenty-one cars, and in his room we found a wagonload of stuff, including robes, chains, tires, tubes and lamps."

In suggesting a method by which wholesale thefts of automobiles could be checked Detective Gleason said:

"Two men should be stationed at every large parking place in the city. Every machine parked should be checked like a coat and hat at a banquet. So that when a man was seen climbing into a car he could, be asked to produce his check. If the checking system was adopted, the thefts would be reduced to a minimum."

Making Men and Autos

HENRY FORD apparently believes so thoroughly in the regenerative influence of hard work and reasonable wages that he is willing to guarantee to "take every convict in Sing Sing and make a man of him." This assertion was contained in his statement before the Federal Industrial Commission.

He explained it more fully when he added:

"My idea is justice, not charity. I have very little use for charities as such. My idea is to help men to help themselves. Nearly all are willing to work for adequate rewards. We have all kinds of cripples in our employ, and they are making good. We have a great many who have been in prison and who were outcasts from society. Every one of them is making a good showing, and is gaining in self-respect and strength of character."

"The criminal type, according to Mr. Ford," writes M. N. Goodnow in the Boston Transcript, "is the man who has not been taught to work properly. Whether the automobile manufacturer is sufficiently schooled in the intricacies of criminology to know what he is talking about is more or less beside the point. The fact is that on the assumption that he does know what he is talking about a chance has been given in his industry to men who would re-establish themselves in society, finding salvation in work and hope and courage in good treatment and reasonable wages.

"Eight thousand families have moved from squalid, unsuitable homes to dry, sanitary, healthy quarters. Police justices say Ford employees are rarely among the unfortunates brought to justice. Hard drinking has almost disappeared.

"The profit-sharing plan and the work of the twenty Ford social investigators have had a telling effect upon the minds, manners, and morals of the thousands of foreign workmen and their families, as well as upon the native American. Overcrowding in flats or houses has been done away with; the boarding-house evil has been exterminated among Ford employees; old houses and filthy homes have been renovated from top to bottom under the social investigator's direction; alleys have been cleaned up and made sanitary, and the general living conditions of hundreds of people have been improved.

"Not long ago a rough looking fellow edged in upon the manager at the latter's home, and wanted to know if he couldn't get a job at the Ford plant.

" 'I don't know you,' said the manager. 'You'll have to be investigated.'

"As if to forestall investigation the man told the story of his life, or at least as much of it as he considered necessary at the time:

" 'I am the worst man in Detroit. I am fifty-four years old, and thirty-two years of those fifty-four I have spent in Jackson (Michigan State) prison. Everybody knows I'm a bad actor,—and I can't get a job.

" 'If I can't get a job with Ford I'm goin' back to Jackson. There's one man I want to 'get' and I'll 'get' him with this.'

"This was a dangerous looking black jack.

" 'The only person that ever played me true,' continued the ex-convict, 'is my wife, but I'm not going to have her doing washing to take care of me.'

"The man was put to work, and for a period of six weeks his work proved to be only of a mediocre type. Then he received a letter from the manager telling him to take a brace and show the good stuff there was in him.

"Next morning he visited the office with his wife and was so broken up that he could barely speak.

" 'That's the first decent thing outside of what my wife has done that's ever happened to me,' said he between sobs. 'And I'll serve you and stick to you and work my hands off. Show me how I can work better.'

"The other day he came into the office again, with his pay envelope in one hand and a roll of bills in the other.

" 'Say pal,' he grinned, 'will you tell me how I can get into a bank and leave this? I am perfectly wise how to get in after they are closed up, and take it out.'

"Now he has made his first payment on a home, and from the reports of the investigators he is living as good and clean a life as any man in Detroit.

"All of which is in vindication of Mr. Ford's announced aim: 'The Ford idea is to make a life—not a mere living—for its men.' "

Lay View of Legal Jeopardy or Res Judicata

WE are not quite sure which principle of law, whether legal jeopardy or *res judicata* was intended to be applied by one of our daily papers in a recent legal (?) opinion to one of its correspondents. The opinion, however, is of interest as illustrative of the vagaries of the untrained legal mind, even of educated and intelligent people.

In the article in question the opinion is given in reply to a letter by a colored man referring to the Frank case, and suggesting that the evident purpose of the agitation in favor of Frank was to saddle the crime upon a negro. Listen to the legal (?) opinion referred to, touching this point: That none of it may be lost we quote it. "Our correspondent is mistaken in supposing that any endeavor is being made to 'substitute' the negro Conley for the condemned man Frank. No such effort could be legally effective in any case, if it were made. . . . A conviction of Frank by whatever process acquits Conley, and there is an end to any further proceeding against the latter for the crime." No, this opinion was not that of the editor of a country southern newspaper to an ignorant colored man, but is given by the editor of a large northern daily to an intelligent educated colored man.

American Institute of Criminal Law

WE are requested to announce that the annual meeting of the American Institute of Criminal Law and Criminology will be held at Salt Lake City on Monday, August 16th, 1915.

Three sessions will be held at 10 A. M., 2 P. M. and 8 P. M. on that date. Reports from committees and the annual address of President Ralston will be the chief items of business. A report will also be submitted from the Society of Military Law, a Branch of the Institute. The annual meeting of the Society of Military Law will be held on Tuesday, August 17th, 1915, at Salt Lake City.

Among the New Decisions

Many think it is easy in most cases to see wherein the right lies. Lord Eldon is credited with saying that men usually imagined that all suits were either black or white, whereas the great majority of them were neither black nor white, but gray.—Hon. Orrin N. Carter.

Assault — mutual combat — withdrawal. The rule that when parties enter into a mutual combat, and the victim in good faith withdraws therefrom and is afterwards assaulted, he may recover damages for such assault, is held in the Nebraska case of Eisentraut v. Madden, 150 N. W. 627, annotated in L.R.A.1915C, 893, not to apply when one who is assaulted and severely beaten strikes his assailant immediately, in the heat of passion, upon escaping from his attack.

Bailment — cleaner of clothing — liability for articles left in pockets. One engaged in the business of cleaning clothing is held in the California case of Copelin v. Berlin Dye Works & Laundry Co. 144 Pac. 961, annotated in L.R.A. 1915C, 712, not to assume the liability of insurer for articles left in clothing sent him to be cleaned, from the fact that he employs a servant to search the clothing for such articles.

Bills and notes — accepting discount for renewal — release of surety. Merely accepting the discount for renewal of notes on the understanding that completed notes, signed by the compensated surety, who is ill when the renewal period arrives, will be delivered as soon as he is able to attend to the matter, and carrying the old notes on an "incomplete file," is held in Hamilton Nat. Bank v. Cook, 130 Tenn. 465, 171 S. W. 86, not such a binding agreement to extend time of payment as will, under the statute, release a nonassenting surety, although a discount tag attached to the notes indicates that they will mature at the dates to which the interest is paid, and entries are made in the bank's books indicating that the old notes are paid.

The cases on agreement to extend time for payment, conditional upon the surety's consent, as a release of the surety, are appended to the report of the foregoing decision in L.R.A.1915C, 831.

Broker — partnership — dissolution — termination of authority. That the dissolution of a firm of real estate brokers terminates all authority to sell property which has been placed in their hands for that purpose, is held in Schlau v. Enzenbacher, 265 Ill. 626, 107 N. E. 107, L.R.A.1915C, 576. Earlier decisions on the question are gathered in 23 L.R.A.(N.S.) 849.

Carrier — discharging passenger on curve — precautions. A street car company which discharges a passenger from the fore part of a car on a curve is held bound in White v. Connecticut Co. 88 Conn. 614, 92 Atl. 411, annotated in L.R.A.1915C, 609, to adopt some precautions to avoid injuring him by the over-

hang of the car as it proceeds around the curve, either by delaying the starting of the car until he is out of danger, or by warning him of the danger.

Carrier — discrimination — special rates. A constitutional requirement that the legislature pass laws to prevent unjust discrimination in the rates of passenger tariffs by railroads is held in the Missouri case of State v. Missouri, K & T. R. Co. 172 S. W. 35, L.R.A.1915C, 778, to render unlawful a requirement that special rates be given to militiamen traveling on orders from the governor, where the legislature has acted upon its constitutional authority to establish a reasonable maximum passenger tariff, and the conditions under which the transportation of the Militia must occur, are not materially different from those for which the rate was established.

Carrier — improper loading of live stock — liability for injury. A carrier is held not liable in Illinois C. R. Co. v. Rogers, 162 Ky. 535, 172 S. W. 948, accompanied with supplemental annotation in L.R.A.1915C, 1220, for injury to live stock loaded by the shipper into a car furnished for that purpose, because of the improper manner of loading, if it did not in fact discover the fault, although it might have done so, since it may assume that the shipper has loaded the car properly.

Carrier — injury to passenger — missile thrown by rioters. Mere failure of the conductor of a street car which stops for passengers at a place where rowdies are making an attack on intending passengers, to start the car as soon as the passengers are on board, even though the passengers have requested him to do so, is held in Louisville R. Co. v. Dott, 161 Ky. 759, 171 S. W. 438, not to render the company liable for injury to a passenger by a missile thrown into the car, if the attacking party attempt to follow the passengers onto the car, and the delay is due to the conductor's ignorance as to which persons entering the car are passengers and his removal of the trespassers as soon as he discovers which they are, so that the car can be moved without danger to persons on the steps or platform.

Annotation upon a carrier's liability for assault upon passengers by strikers, mob, or third persons is appended to this decision in L.R.A.1915C, 681.

Carrier — liability for neglect to waken passenger. A carrier is held liable in damages in the South Carolina case of Gilkerson v. Atlantic Coast Line R. Co. 83 S. E. 592, annotated in L.R.A. 1915C, 664, for failure to comply with the conductor's promise to see that a passenger is awake in time to leave the train at his destination, which will be reached in the night, where he informed the conductor that because of weariness he feared that he would not be able to keep awake, and requested the conductor to assist him to leave the train.

Constitutional law — due process of law — liberty — forbidding discrimination against union labor. The rights of personal liberty and property are held infringed without due process of law in Coppage v. Kansas, 236 U. S. 1, 59 L. ed. —, 35 Sup. Ct. Rep. 240, accompanied with supplemental annotation in L.R.A. 1915C, 960, by a statute under which, as construed and applied by the highest state court, an employer or his agent may be criminally punished for having prescribed as condition upon which one may secure employment under, or remain in the service of, such employer (the employment being terminable at will), that the employee shall enter into an agreement not to become or remain a member of any labor organization while so employed; the employee being subject to no incapacity or disability, but, on the contrary, free to exercise a voluntary choice.

Constitutional law — police power — regulating prices — business affected with public interest. That a business may be so far affected with a public interest as to permit legislative regulation of its rates and charges, although no public trust is imposed upon the property, and although the public may not have a legal right to demand and receive service, is held in German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 58

L. ed. 1011, 34 Sup. Ct. Rep. 612, which further determines that the business of fire insurance is so far affected with a public interest as to justify legislative regulation of its rates.

Recent decisions on fire insurance as a business affected with a public interest are appended to the foregoing case in L.R.A.1915C, 1189, the earlier adjudications having been gathered in 29 L.R.A.(N.S.) 1195.

Contract — for construction — defect of plans — right of subcontractor. A subcontractor who is prevented from completing his work because of defects in the plans furnished by the owner is held entitled in Huetter v. Warehouse & Realty Co. 81 Wash. 331, 142 Pac. 675, to hold the contractor liable for the cost of services rendered, but not for profits which he would have realized had he completed the work, although he saw the plans before entering into the contract; since he does not assume any responsibility for the sufficiency of the plans.

The effect of defective or insufficient plans upon the rights and liabilities of contractors and subcontractors who do not expressly warrant them is considered in the note appended to the foregoing decision in L.R.A.1915C, 671.

Contract — for securing public contract — validity. A contract to pay a commission for obtaining a contract from a municipality for public work, which obligates the employee to do everything in his power to accomplish the success of and aid the business of his employer, is held invalid as against public policy in the Oregon case of Hyland v. Oregon Hassam Paving Co. 144 Pac. 1160, accompanied with supplemental annotation in L.R.A.1915C, 823, since it might include the use of illegal means to induce the awarding of the contract and the securing of petitions therefor.

Corporation — liability of director for injury to employee. The president of a corporation who is also a director is held not personally liable in Aubrey v. Stimson, 160 Ky. 563, 169 S. W. 991, accompanied with supplemental annotation in L.R.A.1915C, 874, for injury to an employee through the explosion of a boiler which was part of the plant of the corporation, if he had no active supervision of the plant, which was under control of persons employed for that purpose, of whose negligence he had no notice.

Electricity — lightning arrester on wires. Where an electric light company maintains overhead wires from its plant to a residence of one of its patrons, for the purpose of supplying light to the house, it is held in the Georgia case of Columbus R. Co. v. Kitchens, 142 Ga. 677, 83 S. E. 529, accompanied with supplemental annotation in L.R.A.1915C, 570, to be the duty of the company to employ such approved apparatus in general use as will be reasonably necessary to prevent injury to the house, or persons or property therein, arising from electricity which may be generated by a thunderstorm and strike the wires, and be conducted thereby into the residence.

Evidence — confession — characteristics and prior acts. A case of first impression as to the admissibility of a prior and concededly false confession of crime to determine the weight to be given to a subsequent confession by the same party of another crime, committed at a later date, or to show the abnormal condition of the confessor's mind is the Nebraska case of Shellenberger v. State, 150 N. W. 643, L.R.A.1915C, 1163. The extent of the decision is that such a confession is admissible where the subject of investigation is the mental condition and peculiarities of the party, and so probably would be of little weight as authority in a case where such question is eliminated, and it is sought to admit it for the sole purpose that it tends to show the probable untruthfulness of the subsequent confession.

Evidence — contents of order for publication. The files of a newspaper in which an order for publication of notice in a tax proceeding was published are held admissible in evidence in Miller v. Keaton, 260 Mo. 708, 168 S. W. 1140, annotated in L.R.A.1915C, 690, when produced from proper custody, as to the

contents of the order, if all papers in the proceeding, including the order for publication have disappeared from the files of the court.

Evidence — crossing accident — safe way. In an action for damages sustained in crossing the tracks of a railroad company at a public crossing alleged to be in a dangerous condition, it is held prejudicial error in the Oklahoma case of Ft. Smith & W. R. Co. v. Seran, 143 Pac. 1141, annotated in L.R.A.1915C, 813, to exclude evidence offered by the defendant to show that there was another and perfectly safe crossing by which the plaintiff might have crossed the tracks without inconvenient interruption to his journey.

Evidence — of customary rate of wages — dispute as to contract rate. In case of a conflict between the parties as to the wages to be paid under a contract for domestic service, evidence of the customary rate for such service is held admissible in Edelen v. Herman, 162 Ky. 500, 172 S. W. 936, annotated in L.R.A.1915C, 1208, to aid the jury in determining what the rate fixed actually was.

Evidence — reputation of insured. Evidence as to the reputation of insured for truth, veracity, honesty, and integrity is held admissible after his death in the Washington case of Rasmusson v. North Coast F. Ins. Co. 145 Pac. 610, L.R.A. 1915C, 1179, in an action to recover insurance upon his property, in which the defense is fraudulent overvaluation of the property in the proofs of loss.

Executor and administrator — fraudulent settlement of claim — objections to account. That next of kin may raise the question of collusion by the administrator in the establishment of a claim against the estate by filing objections to his account, is held in the Iowa case of Re Miller, 149 N. W. 227, annotated in L.R.A.1915C, 736.

Highway — negligence in driving animal known to be afraid of automobiles. Driving upon the highway with a mule known to be afraid of automobiles is held not negligence in the Arkansas case of Butler v. Cabe, 171 S. W. 1190, L.R.A.1915C, 702, if there was no reason to anticipate that the driver would not have time to take precautions to protect himself from injury when an automobile approached.

Husband and wife — property of wife — conveyance to husband in trust. Under a statute permitting a married woman to convey her property by joint deed with her husband it is held in Brandau v. McCurley, 124 Md. 243, 92 Atl. 540, annotated in L.R.A.1915C, 767, that she may by deed in which he joins convey her property to him as trustee.

Insurance — classes of property — severable policy. Where an insurance policy is issued covering different classes of property, each insured for a stated amount, and there is a breach of a condition or warranty respecting one class not affecting the risk as to others, it is held in the West Virginia case of Fisher v. Sun Ins. Office, 83 S. E. 729, L.R.A. 1915C, 619, that the contract should not be considered as entire, but as severable, and a recovery allowed on account of the property not affected by the breach, notwithstanding the policy stipulates that it shall be void, and no action brought on it, when any one of its conditions or warranties is broken, provided the insured has committed no fraud, and no act prohibited by public policy is involved.

Landlord and tenant — breach of covenant not to let premises to rival business. The letting by a property owner of a storeroom for the sale of articles which by a lease signed by both parties, of another room in the building, he has covenanted with its lessee not to do, is held in University Club v. Deakin, 265 Ill. 257, 106 N. E. 790, annotated in L.R.A.1915C, 854, to justify the latter in rescinding his contract and surrendering possession of the property.

Landlord and tenant — covenants — breach by landlord. A covenant in a lease to pay rent, by the tenant, and a covenant by the landlord to keep the

cellar waterproof, are held in the New Jersey case of Stewart v. Childs Co. 86 N. J. L. 648, 92 Atl. 392, to be independent covenants. The case further determines that a breach of the latter is not a defense to an action for the nonpayment of rent under the covenant.

Supplemental annotation accompanies the report of the foregoing decision in L.R.A.1915C, 649.

Libel — false statement in affidavit supporting motion for new trial. A statement in an affidavit supporting a motion for new trial in an action by a widow to recover damages for the death of her husband, charging illicit relations between herself and a material witness in support of her claim, is held absolutely privileged, in Keeley v. Great Northern R. Co. 156 Wis. 181, 145 N. W. 664, annotated in L.R.A.1915C, 986, and will not support an action for libel, although absolutely false.

Life tenant — retail business — increase in value — ownership. Under a devise for life of a retail business, the estate of the life tenant is held entitled in Ruppert v. McArdle, 42 App. D. C. 392, annotated in L.R.A.1915C, 846, to the difference in value of the stock at the time he receives possession of the property and the time of his death, even though the first value is ascertained by appraisement and the last by actual sale of the property.

Master and servant — authority to employ surgeon. A salesman for a mill company, who is directed by the superintendant to take an injured employee to the hospital, is held in the Washington case of Vanderboget v. Campbell Mill Co. 144 Pac. 905, accompanied with supplemental annotation in L.R.A.1915C, 808, to have no implied authority to contract for the services of surgeons and nurses different from those whom the company has employed to care for its employees and who are at the time available.

Master and servant — failure to procure medical assistance — liability. A corporation whose employee is engaged in dangerous business for it is held liable in the Missouri case of Hunicke v. Meramec Quarry Co. 172 S. W. 43, accompanied with supplemental annotation in L.R.A.1915C, 789, for his death through its failure to use reasonable diligence to furnish him with surgical aid upon his being so badly injured while in the performance of his duties that he is physically or mentally incapable of procuring assistance for himself, and aid is necessary to save his life, although the injury was not caused by the fault of the employer.

Master and servant — police officer — liability for acts. A special police officer appointed by the governor at the instance of a railway company, though prima facie a public officer, is, when specially employed by the company to enforce its rules and to protect the passengers on its trains, in that regard, a servant of the company, and if, while on a train as such servant, he inflicts injury on a passenger, not acting in his capacity as a public officer for the vindication of the law, or not justified by the law of self-defense, the company is held liable in the West Virginia case of Moss v. Campbell's Creek R. Co. 83 S. E. 721, accompanied with supplemental annotation in L.R.A.1915C, 1183, notwithstanding the injurious act is prompted by motives purely personal to the servant.

Mob — liability of city — prisoners. A large number of persons confined together in a city jail, who joined together to whip another prisoner, and who did severely whip and injure him, are held in Blakeman v. Wichita, 93 Kan. 444, 144 Pac. 816, L.R.A.1915C, 578, to be a "mob" or "riotous assemblage," within the meaning of the statute making cities liable for damages resulting from mob violence.

Municipal corporation — creation of nuisance — liability. A municipal corporation which, acting under its charter authority to dispose of rubbish accumulated within its limits, uses it to fill an excavation in a highway, and thereby creates a nuisance, is held liable in

Hines v. Rocky Mount, 162 N. C. 409, 78 S. E. 510, L.R.A.1915C, 751, for injury thereby caused to neighboring property, but not for sickness among the occupants thereof.

Municipal corporation — disposal of garbage — nuisance. The courts differ upon the proposition as to whether the disposition or removal of garbage and refuse constitutes a governmental function within the rule that in the performance of a governmental function a municipality is not liable for the negligence of its officers and employees.

Louisville v. Hehemann, 161 Ky. 523, 171 S. W. 165, annotated in L.R.A. 1915C, 747, is a case of unusual importance in this connection, holding that notwithstanding a municipality is not liable for the negligence of its agent in disposing of garbage, upon the ground that it is a discharge of a governmental function, the municipality is liable in damage for depreciation in value of adjoining property in permitting its dumping ground to become a nuisance, as such act constitutes a taking or damaging of property within the purview of a constitutional provision requiring compensation for property taken, injured, or destroyed for public use.

Municipal corporation — failure to clean street — liability. The duty of keeping the streets of a municipality free from matter which, if allowed to remain, would affect the health of the public, is held in Savannah v. Jordon, 142 Ga. 409, 83 S. E. 109, to be a governmental function, the exercise of which would exempt the municipality from liability to a suit for damages to an employee without fault, who is injured by reason of a defective cart in which he is hauling "the sweepings of the streets" of such municipality, and which has been furnished him for that purpose by the agents of the municipality.

Street cleaning as a governmental function is the subject of the note accompanying the foregoing decision in L.R.A.1915C, 741.

Municipal corporation — lease of property — agreement to pay taxes — validity. A provision in a lease of town land that the lessor will pay the taxes assessed on the property or permit them to be deducted from the rent is held enforceable in the New Hampshire case of Hampton Beach Improv. Co. v. Hampton, 92 Atl. 549, annotated in L.R.A. 1915C, 698, so as to permit a recovery of the taxes paid, although they are greater than the annual rental, and not invalid as an agreement to exempt the lessee from taxation.

Negligence — fall of fire wall — effect. The fall of a wall left standing for more than a month after a fire has destroyed the building of which it was a part, without any attempt to protect it or prop it up, to the injury of adjoining property, is held prima facie evidence of negligence, in the Arkansas case of Hall v. Gage, 172 S. W. 833, annotated in L.R.A.1915C, 704.

Negligence — last clear chance — avoiding injury to driver of frightened mule. Negligence, if any, in driving upon the highway with a mule known to be afraid of automobiles, it is held in the Arkansas case of Butler v. Cabe, 171 S. W. 1190, L.R.A.1915C, 702, will not preclude one from holding the driver of an automobile liable for injury due to the fright of the mule, if he might, after discovering the danger of the driver, have prevented the injury by the exercise of ordinary care.

Negligence — wall adjoining street — loose stones. Where an infant eight or nine years of age, while playing upon a pile of railroad ties resting against a railroad wall, upon a public street, was injured by the falling of a stone from the wall, and there was testimony from which it was inferable that the stones in the wall were loose and the wall in need of repair it is held in the New Jersey case of Soriero v. Pennsylvania R. Co. 86 N. J. L. 642, 92 Atl. 604, L.R.A.1915C, 710, that the defendant was prima facie guilty of negligence in maintaining the wall in a dangerous condition to persons lawfully upon the street.

Physician — malpractice — experimental remedy. A surgeon is held not

liable in the Michigan case of Miller v. Toles, 150 N. W. 118, annotated in L.R.A.1915C, 595, for the loss of a patient's foot where, at the time he was called to the case, amputation was indicated, because he tried a remedy known and approved by the profession, though not generally, which had in some instances achieved remarkable results in similar cases, but failed in the case to which he was called, so that amputation was finally resorted to. In an earlier note on this question in 37 L.R.A. 836, it is said that the rule is very strict against trying experiments, and that it would seem that any advancement in the art must be at the personal risk of the physician rather than of the patient. Miller v. Toles does not conflict with the rule, as the treatment in that case could not properly be classed as experimental, and was it appears, warranted by the circumstances.

Privacy — moving picture show — violation of statute. The use of the name and purported likeness of a person by photographing another made up to represent him, as part of a moving picture film for exhibition purposes, the name being used prominently in the advertising to increase the demand for the picture secured, is held in Binns v. Vitagraph Co. 210 N. Y. 51, 103 N. E. 1108, where his personal movements are featured without relation to the other scenes for the amusement of the audience, and without design to instruct or educate them, a violation of a statute giving a right of action to anyone whose name or picture is used for advertising purposes or for the purpose of trade without his consent.

Supplemental annotation on the right of action for use of photograph or name for advertising purposes is appended to the foregoing case in L.R.A.1915C, 839.

Railroad — trespasser — negligence as matter of law. A trespasser pushing a push car along a railroad track is held, as matter of law, not negligent in Great Northern R. Co. v. Harman, 217 Fed. 959, L.R.A.1915C, 843, in attempting to remove the car from the track upon discovering the approach of a train, instead of getting himself out of danger, so as to relieve the railroad company from liability for negligently injuring him; but the question of such negligence is for the jury.

The position taken by the court that the plaintiff was not as a matter of law guilty of continuing negligence in persisting in his efforts to remove the push car from the track in front of the approaching train, in connection with the fact that the trainmen discovered his presence upon the track and ought to have realized his peril in time to have prevented the accident, seems to have removed any objection to the application of the doctrine of last clear chance, notwithstanding the antecedent negligence of the plaintiff in getting into a position of danger.

Schools — power to permit sale of books in school building. Authority to permit the principal to conduct a business of selling school supplies at a profit in a school building is held not conferred on the school board in the Wisconsin case of Tyre v. Krug, 159 Wis. 39, 149 N. W. 718, L.R.A.1915C, 624, by a provision that it may adopt rules and regulations for the management of the public schools, and adopt such measures as shall promote the public usefulness of the schools.

Show — injury to patron — negligence of concessionary — liability. A fair association is held liable in Graffam v. Saco Grange, 112 Me. 508, 92 Atl. 649, L.R.A.1915C, 632, for the death of a patron by the negligence of a person to whom it has let space for a shooting gallery, in removing a cartridge from a rifle, where his carelessness was such as to require oversight or precautionary steps to protect patrons, which the association failed to exercise.

Slander — giving character to servant — repeating rumor. The privilege of one who, in answering an inquiry as to the character of a servant, makes statements as of information received from others, is held in Doane v. Grew, 220 Mass. 171, 107 N. E. 620, L.R.A. 1915C, 774, not to depend upon his personal bona fide belief in the truth of the facts stated, or whether or not he ought to have believed them, or was reckless and careless in believing them.

Street railway — curve — overhanging — duty to pedestrian. In view of the well-known fact that in rounding a curve, the rear end of a street car will swing beyond the track and overlap the street to a greater extent than the front, it is held in the New Jersey case of Miller v. Public Service R. Co. 85 N. J. L. 631, 92 Atl. 343, accompanied with supplemental annotation in L.R.A.1915C, 604, that the motorman is justified in presuming that an adult person standing in the street near the track, who is apparently able to see, hear, and move, having notice of the approach of the car and of the existence of the curve in the track, will draw back far enough from it to avoid being struck by the rear of the car as it swings around the curve in the usual and expected manner, and under such circumstances, and it is not negligent operation on the part of the motorman to continue the progress of the car without warning such person of the possible danger of collision with the rear of the car, because of the swing, if he remains in the same position.

Succession tax — shrinkage of estate — payment by executor — necessity. The only case passing upon the personal liability of the personal representative for inheritance tax, where, because of a shrinkage of the estate after appraisement of the tax, there were insufficient funds to pay, seems to be Re Meyer, 209 N. Y. 386, 103 N. E. 713, which holds that if after appraisement of a transfer tax, the estate, without fault or delinquence on the part of the executor, shrinks, so that no money comes into his hands with which to pay the tax, he is not required to pay it out of his own funds, although the statute provides that he shall not be entitled to a final accounting of the estate unless he shall produce a receipt for the tax, and that he shall be personally liable for the tax until its payment.

The note appended to the foregoing decision in L.R.A.1915C, 615, treats of the personal liability of an executor or administrator for the succession tax.

Tax — lodge — charity — exemption. A building owned by a lodge and used as a meeting place for its members and for the social enjoyment of members and their guests, the surplus funds of which, together with voluntary contributions of members, are devoted to the relief of the needy, is held not exempt from taxation as being exclusively used for services purely charitable, in the Missouri case of St. Louis Lodge No. 9, B. P. O. E. v. Koeln, 171 S. W. 329, annotated in L.R.A.1915C, 694.

Usury — right of creditor to question. That judgment creditors of an insolvent debtor, may show usury in a prior note of their debtor secured by deed of trust, and have it eliminated from such indebtedness is held in the Mississippi case of Spinks v. Jordan, 66 So. 405, which is accompanied in L.R.A.1915C, 634, by a note on the right of creditors to set up usury in their debtor's contract with others.

Water — embankment against flood — right of municipality. A municipal corporation situated on the lowlands along a stream it is held in Smeltzer v. Ford City, 246 Pa. 560, 92 Atl. 702, L.R.A.1915C, 700, may erect an embankment to prevent flood water from the stream overflowing and injuring property within its limits, although the result is to cause the water to rise somewhat higher on the property on the opposite side of the stream than it otherwise would have done.

Will — devise to persons upon reaching a certain age — vested estate. A devise to children on their arriving respectively at the age of twenty-one years is held vested, and not contingent in Re Paxson, 241 Pa. 452, 88 Atl. 673, annotated in L.R.A.1915C, 1009, when the will also provides that in case of the death of either before arrival at that age without surviving issue his share shall be divided among the survivors, and that part of the income shall be used for their education and support until their arrival at the age specified; especially where in a codicil testator states that he has given the property to the children on their arrival at the specified age, and gives directions for the care and disposition of the property on that basis.

Recent English and Canadian Decisions

[NOTE.—The more important of these decisions will be reported, with full annotations, in British Ruling Cases.

Bills and notes — words added as affecting negotiable character. An instrument in the ordinary form of a promissory note, except that the words "for value received" were struck out, and "account of lumber to be shipped" written in, is held in Merchants' Bank v. Bury, 33 Ont. L. Rep. 204, to be a negotiable promissory note, and not an instrument expressed to be payable on the contingency of certain lumber being shipped.

Conflict of laws — change of domicil resulting in enlarged testamentary capacity — effect on former will. A woman who, with her intended husband, was of Dutch nationality and domiciled in Holland, made a will leaving all her property to her intended husband, "with reservation only of the legitimate portion or the lawful share coming to her relations in a direct line in so far as they may exist at her death and may be competent and able to inherit from her." After their marriage they acquired an English domicil. Held, that the proportion of the estate to which the husband was entitled under the will was to be determined by the English rather than by the Dutch law. Re Groos [1915] 1 Ch. 572.

Contracts — substantial performance — recovery on quantum meruit basis. The authorities on the question of the right of one supplying work and labor for the erection or repair of a building under a lump sum contract, to recover therefor where he has departed from the terms of the contract, are reviewed in Dakin & Co. v. Lee, 84 L. J. K. B. N. S. 894, where they are summarized as follows: He is entitled to recover unless (1) the work he has done has been of no benefit to the owner; or unless (2) the work he has done is entirely different from the work which he has contracted to do; or unless (3) he has abandoned the work and left it unfinished.

Perpetuities — gift to husband of unmarried woman for life with remainder to her children. The rule that a limitation to the issue of a person who is or may be unborn is void for remoteness is held in Re Bullock's Will Trusts [1915] 1 Ch. 493, not to apply to the case of a limitation of rents and profits of certain realty to a woman then unmarried, for life, and after her death to any husband with whom she might intermarry and who should survive her, during his life, and, after the death of both, upon trust for the children of such woman attaining twenty-one, although the husband may be a person unborn at the time the gift takes effect, since the parent whose individuality is taken into consideration, is a person in being. Sargant, J., by whom the above case was decided, declined to follow a decision of Eve, J., to the contrary in Re Park [1914] 1 Ch. 595, on the ground that in that case the judge did not express any opinion of his own, but merely purported to follow earlier decisions, which, in the opinion of Sargant, J., are not to be taken as authoritatively deciding the question.

Wills — charitable trust for protection of animals — validity. A bequest of a fund upon trust "for the protection and benefit of animals," to be applied for their use as the trustees should think fit, is a valid charitable trust, though not limited in terms to useful or domestic animals. "It is a gift for a general public purpose beneficial to the community. A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these feelings to promote humanity and mortality, generally repress brutality, and thus elevate the human race." Re Wedgwood, 84 L. J. Ch. N. S. 107.

Wills — election — compensation — effect of restraint on anticipation. The doctrine that one whose property is disposed of by the will of another must elect between the assertion of his legal rights to the property and the provision made for him by the will has been held to apply in the case of a spinster, the gift to whom is fettered by a future restraint upon anticipation, whether or not the restraint is in terms confined to coverture, she being, at the time when the right to compel election arises, capable of disposing of her interest under the will; though such doctrine is inapplicable where, at such time, the legatee is under coverture. Re Tongue [1915] 1 Ch. 390; Re Hargrove [1915] 1 Ch. 398.

Wills — gift of income as gift of entire fund. The rule that a gift of income of personalty without any limit of time is equivalent to a gift of the capital does not apply to a gift of the net profits arising out of a partnership business continued by the executors, since the net profits of a partnership business are not the fruit of the capital employed in the business alone, but are the result of the employment of the capital and of the exertions of the partners as well, and since a partner's share of the profits may, and often does, bear no relation to the share in which he is interested in the capital of the partnership. Re Lawes-Wittewronge [1915] 1 Ch. 408.

Workmen's compensation — injury arising "out of and in the course of" the employment. A brewer's drayman whose duty it was from 8 in the morning till 8 in the evening, to drive around a certain district in a dray belonging to his employers, for the purpose of obtaining orders for and delivering beer to their customers, at about 2 o'clock in the afternoon left his dray at the side of the road opposite a public house, to which he went to get a glass of beer. After an absence of about two minutes he left the public house to return to his dray, and while crossing the road was run down and killed by an automobile. It was held that as he was, under the circumstances, entitled to procure reasonable refreshment for himself while on his rounds, the accident arose in the course of his employment; and that as he was from the nature of his duties as a drayman peculiarly exposed to street accidents, it arose out of his employment; and therefore that his dependents were entitled to compensation under the workmen's compensation act. Martin v. J. Lovibond & Sons [1914] 2 K. B. 227.

Workmen's compensation — accident arising out of employment—prohibited act. A switchman on a private line of railway, whose duty it was to keep a lookout by walking in front of cars when they were being moved, got on the buffer of a car to ride, contrary to the rules of the employer, fell off, and was run over. Under these circumstances it was held by the English court of appeal in Herbert v. Samuel Fox & Co. [1915] 2 K. B. 81, 84 L. J. K. B. N. S. 670, that as the switchman was doing that which he was not instructed to do at all, and in the doing of which he incurred a risk which, as between him and his employer, he ought not to have been exposed to, the accident was not one arising out of his employment.

Workmen's compensation — accident arising out of employment — injury resulting from attempt to board moving train. A foreman whose duty it was to return from his work by train each evening at a specified time in order to report to his employers upon his work, and who traveled upon a season ticket furnished by his employer, on one occasion reached the railway station just as the train which it was necessary for him to take in order to keep his appointment was pulling out. In endeavoring to board it, he fell between the train and the platform and was killed. Under these circumstances it was held in Jibb v. Chadwick [1915] 2 K. B. 94, that the risk attaching to the attempt to enter a train in motion was not a risk reasonably incidental to his employment, and therefore that the accident did not arise out of the employment within the meaning of the workmen's compensation act.

The earth was made so various, that the mind
Of desultory man, studious of change
And pleased with novelty, might be indulged.—Cowper.

Novel Excuse for Motor Speeding. The excuse given by a young woman motorist of Yonkers, New York, for speeding in her automobile will perhaps stand as a type of defense in future cases in court. She said that she noticed a motorcyclist approaching from the rear so rapidly that she was "actually afraid" he was going to run into her, so in order to avoid an accident by keeping out of his way she put on more speed and still more as he increased his pace, until finally he overtook her, and she got the surprise of her life when informed that she was under arrest. This is not the first case in which a scorching motorist has tried to avoid a collision with a cycle policeman, but perhaps the first on record in which the fact has been frankly acknowledged. Some motorists indeed aver that if the policeman did not ride quite so fast they, the motorists, would not be compelled to hit so sharp a pace, and thus they lay the blame on the officers of the law for speeding things up generally. It might possibly be that if cycle policemen were compelled to observe the speed limit there would be fewer cases of scorching by motorists. Certainly there would be fewer arrests. The point in which the nonriding public is chiefly interested, however, is not so much the actual number of arrests as the effect that those arrests have in teaching law observance to motorists. Owing to the collateral system and the lack of cumulative punishments in court for repeated offenses, the activities of the cycle police appear to accomplish but little in the way of real reforms.—Washington Star.

Overconfidence. At about this time, as the Old Farmers' Almanack would say, look out for automobile accidents. People who have driven continuously ever since early spring no longer feel insecure. Driving has become "automatic." It is "second nature." Anxieties that annoyed them at the beginning of the season have vanished quite. The man is now "a part of his car." His "sure touch," bred of experience and unremitted discipline, seems his best protection. Whereas, listen:

It is the old sailor who gets drowned, the old brakeman who falls from the freight car's top, the old lion-tamer who is devoured by his beasts. *Verbum sap.*
—Philadelphia Public Ledger.

Unique Safety-First Measures. In order that he may escape the fate of a fellow workman, who was run down by an auto and badly injured, Carl Bergstrom, switchman for the Duluth Street Railway Company at Garfield avenue and Superior street, is said to have adopted unusual "safety first" measures.

Each night he is on duty he has dangling from the tail of his coat a lantern with a red globe, the world-wide signal of danger. He has had many narrow escapes, for at this point there pass scores of autos containing joy riders to and from Superior. An auto, driven by a man who was clearly under the influence of liquor, came so close and quickly that it broke the broom with which Bergstrom was sweeping the snow out of the "frog" of the tracks.

That settled it, and now, nightly, auto-

ists and pedestrians may see, as they approach the corner, a red light moving about like a blushing will o' the wisp.

Humane Society Intervened. Finding it impossible to exercise his bulldog enough, an ingenious Missouri blacksmith devised an exercising machine.

Taking a wagon wheel he fastened it to the ground with a pin through the hub. Across the wheel he placed a board with the ends protruding. With a short rope he tied the bulldog to one end of the board. A cat, borrowed from a neighbor, was tied to the other end. The dog started out to rob the cat of seven lives, but found it just out of reach. Around they went, to the delight of the blacksmith, until someone reported to the Humane Society. An investigator took the "incentive" back to the owner, which stopped the dog-and-cat "pinwheel."

Sweetheart's Diary Saves Him. A young man in Minnesota is a free man to-day because he has a sweetheart who kept a diary, He was charged with passing a worthless check. The state cited a time at which he was alleged to have been in company with two men downtown. His fiancee, young and pretty, appeared with her girlish diary, to show that he was with her at the time. The alibi worked, and the young man was freed.

A Poetical Affront. Because he sent her a marked copy of Kipling's "Vampire," a gunner in the Navy is being sued for separation by his wife. The implication contained in the sending of Kipling's volume to her was the quintessence of cruelty, she told the judge.

A Good Reason. Two Italians sought a Jackson (Miss.) lawyer for advice. One had been in America for years and was a naturalized citizen. The second had been here only a few weeks, could not talk English, and was in distress lest he should have to return to Sunny Italy and take up arms against the Teutons. Number one acted as interpreter, and laid the dilemma before the lawyer.

The lawyer is known for his deep reading and deeper voice. On this occasion he was highly patriotic.

"Ask this man," he directed, "if he does not know that in the history of the world no country has played a more important role than Italy. Ask him if he realizes that it was Italy that gave to the earth Garibaldi. Ask him if he has not heard in song and story of the glorious traditions of ancient Rome; if in infancy he was not told of how well Horatius kept the bridge across the Tiber, if he does not know the story of great Pompey and of the immortal Julius Cæsar?"

The interpreter made noises for about ten minutes, and advised the lawyer that the new American was familiar with all these things.

"Ask him, then, if, remembering this glorious heritage of being a Roman citizen, once more honorable than to be a nobleman of any other nation, he is not proud of it, and why he now wants to shirk this splendid opportunity of serving so righteous a cause."

The interpreter said something. The Italian replied with a shrug, and something that sounded like "Chica I aca lee."

"Well," said the lawyer, "what does he say about it?"

Said the interpreter, while the office force went into convulsions, "He say Hell, he gitta shoot."—The Clarion-Ledger, Jackson, Miss.

At the Bar. A mule standing up at the bar with its two front feet resting on the top rail was the sight presented to patrons of a saloon in the business district, states a Cincinnati dispatch to the New York Sun.

The animal, which had been secured by a municipal court bailiff on a writ of replevin, was being taken to a stable. The officer had stepped into the saloon to get a glass of beer. He left the animal in charge of a man outside.

Hardly had the beer been drawn when there was a commotion at the side door, and in came the mule. All efforts to get it to leave proved futile until it had been given four glasses of beer.

A news item from Belaire asserts that saloon-keepers have become so careful about serving possible minors with drinks that all had copies of the Bible behind

their bars. "If in doubt, we make 'em swear their ages," said one of those responsible for the innovation. "Some look at the book, swallers hard, and then orders seltzer," he concluded.

He Skipt. Here is one of the "short and simple annals of the poor" as inscribed in His Honor's docket:

"Be it remembered that on this 15th day of Sep 1909 City Marshall W——— P——— epeered in this cort with R——— B——— Charging the Sed R. B. with Drunkenes & Disorderley on the Streets of the City of C——— S. D., the aboff R——— B——— Pledet Gilty of the charge therefor this cort Finds the Set R——— B——— $8.00 and having no money to Pay find, this cort orders that Set R——— B——— be Put to work on the Streets of aleys in the City of C———, S. Dak. at the rate of $2.00 per Day until find is paid.

"D. W. B———, Police Justice.
"Prisner Scipt."

On His Voir Dire. James Shepard, alias Whisky Jim, was indicted by a Nevada grand jury for an assault with a deadly weapon, to-wit, a bowie knife, upon the person of See Yup, a Chinese laundryman, because the latter refused to deliver the shirt of the former without being paid for his work.

At the trial the district attorney called See Yup to the witness stand. A bland little Chinaman, with his wounded arm swathed in a bandage, climbed into the witness chair, when Colonel Peyton Calhoun Wiggins arose: "If your Honor pleases," said he, "I object to See Yup being sworn. The law excludes negroes and Indians from testifying in cases where a white man is a party, and See Yup, although apparently a Chinaman, is, in law, both a negro and an Indian. Such is the decision of the supreme court of California in the case of The People v. Hall, reported in the 4th volume of California Reports, page 399. The court says: 'The appellant, a free white citizen of this state, was convicted of murder upon the testimony of Chinese witnesses. The point involved in this case is the admissibility of such evidence.' The act regulating criminal proceedings provides that 'no black or mulatto person or Indian, shall be allowed to give evidence for or against a white man.' The word 'black' may include all negroes, but the term 'negro' does not include all black persons. All persons who are not white are black, and a Chinaman, being yellow, is therefore a black man, and cannot testify against a white man.

"When Columbus first landed upon the western shores of this Continent he was attempting to discover a western passage to the Indies, and imagined that he had found it. He therefore named the aboriginal inhabitants 'Indians,' by which name they have since been known.

"The term is generic, and applies to all natives of Asia. The similarity of the skull and pelvis of a Chinaman and a North American Indian, the resemblance in eyes, beard, hair, and other peculiarities, are such as to show that the word 'Indian' is a generic, and not merely a specific, term.

"The Chinese witnesses against the appellant Hall, and on whose testimony he was convicted of murder, not being white persons, were therefore black persons, and being Mongolians, were natives of an Asiatic race, and were therefore Indians within the meaning of the law. Such witnesses will not be permitted to swear away the life of a white man, and the judgment is reversed.

"That decision, I take it," said Colonel Wiggins, "settles this case."

"Nevada," said the Judge, "is now a state on her own account, and the fool decisions of the supreme court of California have no force in this locality. Precedents, do you say? Precedents nothing. There is no law whatever in the first six volumes of the California reports, and mighty little in some of later dates. Did you ever see a nigger or an Apache Indian with a pig tail trailing behind him? Your objection is overruled. Let the witness be sworn."

"Before doing so, your Honor," said Colonel Wiggins, "I demand the right to examine this witness on his *voir dire*."

"Proceed," said the court.

"Do you, See Yup, understand the nature of an oath?"

"Sure," answered the Chinaman, "me sabe."

"Well, sir, explain to the court the nature of an oath."

"Suppose me tella lie," replied See Yup, "when I go die Jleese Clise make me a heap of tlubble, and before that I catch plenty tlubble here, for Melican Judge send me Stlates plison."

"Humph," said the Colonel, "suppose you tell the truth, what then?"

"Suppose I tella tluth, Melican Judge send your client Whisky Jim to Stlates plison."

"The witness," said the Judge blandly, "is clearly qualified. Let him be sworn." —Thomas Fitch of the Los Angeles Bar.

An Alternative Sentence. This gem adorns the docket of a western justice:

"Tuesday Nov. 28, 1909.

"John Doe epeered before Pledet Gilty for being Drunk gave him 10 Days ore 10 minits he took the 10 minits.

"D. W———, Police Justice."

A Legal Opinion Desired. The following letter was received by a Georgia attorney:

"If a man rents a crop on halves for himself and family, and his family runs away and leave him, can he have them arrested and brought back (the family consists of wife and five children) if he can have them brought back and they try to fight it what would you chrge to represent me in the suit plese let me hear from you by Saturday morning."

On the Limits. The following is a copy of an entry in the docket of a South Dakota police justice:

"on aagust 24 1909 epered befor me John Doe and Pledet Gilty for being Drunk. find $5.00 and Cost. was Released to go to work & Pay find next Saturday and Stands Comitet till find is Paid.

"D. B———, Police Justice.

"fine was not paid."

Expensive Curiosity. A firm of Washington lawyers employed a shorthand reporter to report the case for their client, for which the customary charge is $10 per day for the time occupied. If the client desires transcript of the testimony, or any part of it, the reporter charges a stipulated amount per folio for the testimony so transcribed.

During the course of the trial the attorneys had occasion to have a transcript of a portion of this testimony made. At the conclusion of the trial the reporter rendered his bill for $98.50 to cover the *per diem* charge, and the additional charge for the portion of the testimony transcribed. The client lived in a different city. His attorney forwarded the bill for payment, and informed him that the charge made by the court reporter was made on the customary basis. In reply the client wrote the following:

"I enclose you a check for $98.50 to pay Mr. P. the reporter in our recent case. . . . I was somewhat surprised at the amount of this charge, but of course know that it is the customary charge, and it is not up to me to kick, and I know it would do no good if I did. But at the same time I could not help thinking that Abe Martin, the psychological philosopher, might find quite a field for quaint expression on such charges, and might comment on the subject something like this: The Court reporter is a man of great intentions. He attends to taking down all that is said, with the intention of telling you just what you did say, if you intend to ask him for a copy. He only charges $10 a day in a tentative way to take the testimony down, but charges ten times as much to take it up, or tell you what you did say, and if a witness stuttered very badly on the stand there is nobody worth less than John D. could afford to be curious as to what they said on the stand."

New Books & Periodicals

Voyaging through strange seas of thought.—Wordsworth.

"The Diplomacy of the War of 1914." By Ellery C. Stowell, Assistant Professor of International Law, Columbia University (Houghton, Mifflin Company, Boston, New York). $5 net.

Time enough has at last elapsed, since the outbreak of the war, for the careful analysis and comparison of the state papers necessary for a final interpretation. Such an analysis of all official documents so far published has for the first time been made by Professor Stowell, of Columbia, resulting in a complete and authoritative account of the momentous negotiations that ushered in the war.

The book contains, furthermore, a remarkably lucid study of the relations of the European states, and of such questions as the violation of Belgian neutrality, the real causes of the war, etc.; together with a series of questions and replies designed to give briefly and accurately just the information everyone is looking for. In short, it covers the ground in a fresh, accurate, impartial, and intensely interesting way, and, by means of the unique arrangement and masterly analysis of the material, it makes the whole tangled web of diplomacy clear and understandable.

As a result of waiting until the official papers of all the warring nations had been made public, the author has been able to produce a work that will stand the test of time, one that will take and permanently maintain a very high place among those called forth by the struggle. It will be followed by two other volumes, one on the diplomacy during the war, and one on the negotiations that will bring the war to a close, making a complete diplomatic history of the most tremendous conflict that the world has ever known.

"Financing an Enterprise." By Francis Cooper. (The Ronald Press, New York). Fourth Edition.

This is a new edition of a well-known work, the sales of which have extended to every civilized country of the world. The author's general purpose is to assist in honest promotion. The changes in the present edition have been made with a view of adapting the book to present conditions.

As the author states: "The scope of the work extends beyond the direct financing of an enterprise, including its investigation, valuation, preparation, and presentation, and its protection meanwhile; also a discussion of the somewhat difficult matter of capitalization; with suggestions as to the use and adaptation of the corporate form, and a consideration of promoters, of the various devices used in promotion, and of other related matters."

The statements, comments, and suggestions contained in the volume are based on an experience of many years in legal work connected more or less directly with the financing of enterprises.

"Growth of American State Constitutions." By James Quayle Dealey, Professor of Social and Political Science in Brown University (Ginn & Co., Boston, New York, Chicago, San Francisco, etc.). $1.40.

Here is a volume on an important and neglected subject; the first treatise devoted entirely to the significance of state constitutions in American polity which has yet appeared. Part I. treats of the historical growth of state constitutions; Part II. compares existing constitutions; and Part III., by tracing the trend of change through the past one hundred and forty years, prognosticates the probable line of change of the future.

According to present indications the next great field of civic reorganization and reform will be our state administrations. The information contained in this work should have a real value in educating the public through the schools to the issues of a larger statesmanship. The present book is intended for college courses in state government, to provide a comprehensive view of the situation as a whole, and also, by special study and amplifications, a detailed knowledge of local conditions and needs.

Reliable information on state constitutions, the history and present tendencies of their development, has not been easily accessible. The pioneer work in so important a field can scarcely fail to interest our readers.

"The Law of Bank Checks." By John Edson Brady (The Banking Law Journal Co., New York). $4.00.

The object of the author, in preparing this volume, was to bring together all the law affecting bank checks, and to present in their proper sequence the rules of law which regulate the rights and liabilities of parties to such instruments. The work is designed for use in all the states, and will be found to be of great convenience, inasmuch as it has been necessary heretofore to search for the learning it contains both in works on the law of banking and in treatises on the law of negotiable instruments.

For the reason that many of the sections of the uniform negotiable instruments act (now adopted with some changes in nearly all the states) apply expressly to checks, the statute is given in full in the Appendix, together with the changes made in the different states.

Mr. Brady has performed his work in a skilful and conscientious manner. His treatise will prove a valuable addition to the lawyer's working library.

"Supplement to Treatise on the System of Evidence in Trials at Common Law." By John H. Wigmore (Little, Brown & Co., Boston).

This supplement contains the statutes and judicial decisions from 1904 to 1914 arranged appropriately under those section numbers and headings of Professor Wigmore's treatise, to which they relate. It brings his comprehensive and magnificent work down to date, and supplies the practitioner with the recent authorities.

In an extensive preface, the learned author comments on the merits of the law of evidence and its treatment by the courts, and considers proposals of improvement. He believes that detailed study and concrete criticism are needed, rather than general denunciations of procedure and courts. He declares that "no reform of rules of evidence will ever of itself, *i. e.*, as an improved rule of law, accomplish much in promoting actual justice." He expects "that the system of evidence, on the whole, will most readily improve when the men who administer it also improve and the system of justice as a whole advances."

"Bohlen's Cases on Torts." Bobbs-Merrill Company. 2 vols. Buckram, $7.50.

"Edelen's Pleading, Practice, Parties, and Forms." (Kentucky.) By T. L. Edelen.

"Curtis' Manual of the Sherman Law." By Everett N. Curtis. 1 vol. $3.50.

"The Swiss Civil Code." Translated by Robert P. Shick. $5.

"The Diplomatic Protection of Citizens Abroad, or The Law of International Claims." By Edwin M. Borchard. About 950 pages, Large Octavo. $8.

Recent Articles of Interest to Lawyers

Adverse Possession.

"Elements of Adverse Possession."—8 Lawyer and Banker, 188.

Athletics and Sports.

"The Secret of Steady Golf."—The American Magazine, July, 1915, p. 21.

Banks.

"Right of State Banks and Trust Companies to Join Federal Reserve System without Relinquishing Charter Powers."—20 Trust Companies, 415.

Bills and Notes.

"New Form of Commercial Note Provides for Trust Company Registration."—20 Trust Companies, 422.

Business.

"Co-operation in American Business."—The Fra, June, 1915, p. 92.

"Good Homes Make Good Workmen."—The American Magazine, July, 1915, p. 39.

Criminal Law.

"A Critical Survey of Certain Phases of Trial Procedure in Criminal Cases."—63 University of Pennsylvania Law Review, 754.

Damages.

"The Hadley-Baxendale Rule in Telegraph Cases," (Measure of Damage for Failure of Telegraph Company Promptly to Transmit Message).—80 Central Law Journal, 455.

Exchanges.

"Influence of World War on Foreign Exchanges."—20 Trust Companies, 430.

Ferries.

"Origin and Monopoly Rights of Ancient Ferries."—63 University of Pennsylvania Law Review, 718.

Fiction.

"Making Money."—Everybody's Magazine, July, 1915, p. 78.

"The Real Adventure."—Everybody's Magazine, July, 1915, p. 39.

Foreign Countries.

"A Woman Alone in China.—II."—The Wide World Magazine, July, 1915, p. 257.

"Six Weeks in Lahoul."—The Wide World Magazine, July, 1915, p. 232.

"The Background of Modern Germany."—Scribner's Magazine, July, 1915, p. 46.

"War-Time Wanderings in the Italian Alps."—The Wide World Magazine, July, 1915, p. 203.

International Law.

"Editorial."—8 Lawyer and Banker, 167.

"The Supposed Chaos in the Law of Nations."—63 University of Pennsylvania Law Review, 703.

Master and Servant.
"New Light on Workmen's Compensation Laws."—80 Central Law Journal, 453.

Partnership.
"The Uniform Partnership Act."—28 Harvard Law Review, 762.

Prison Reform.
"Our Brothers in Bonds."—The Fra, June, 1915, p. 76.

Psychology.
"New Science of Psycho-Analysis."—Everybody's Magazine, July, 1915, p. 95.
"The Wishful Self."—Scribner's Magazine, July, 1915, p. 115.

Rates.
"Separation of Interstate and Intrastate Accounts in Federal and State Regulation of Rates."—28 Harvard Law Review, 742.

Shakespeare.
"Shakespeare—and World War."—The Fra, June, 1915, p. 83.

Trusts.
"Liabilities Incurred in the Administration of Trusts."—28 Harvard Law Review, 725.
"The Formal Creation of a Trust Inter Vivos."—20 Trust Companies, 459.

Vendor and Purchaser.
"When is a Title Marketable."—8 Lawyer and Banker, 182.

War.
"Aerial Warfare and International Law."—Scribner's Magazine, July, 1915, p. 19.
"Lord Kitchener's Great Bluff."—The American Magazine, July, 1915, p. 14.
"The Aeroplane in Warfare."—Scribner's Magazine, July, 1915, p. 1.
"The United States."—20 Trust Companies, 436.

Woman Suffrage.
"Suffrage, A World Wave."—Everybody's Magazine, July, 1915, p. 1.

Photograph by Underwood & Underwood, N. Y.

BELGIAN AUTO MITRAILLEUSE.
An adaptation of the auto to military purposes.

Judges and Lawyers

A Record of Bench and Bar

Our New Secretary of State

THE appointment of Robert Lansing, counselor of the State Department, to the position of Secretary of State, *ad interim*, brings to the important position of premier of the American government a man who possesses many interesting qualifications. Not only is he a great international lawyer, but he is probably a more versatile citizen than any man who has preceded him in the position.

Mr. Lansing has had long experience in international affairs. He has represented the United States in more international arbitrations than any living American. He has appeared more frequently before international tribunals than any living lawyer. He is a writer of books, and is an editor of the American Journal of International Law, to which he has contributed many editorials, articles, and book reviews. He is an indefatigable worker.

Outside of office hours Mr. Lansing is a painter, a draftsman of great ability, a writer of exquisite verse, an ardent fisherman, a good golf player and an enthusiastic baseball fan.

He has a passionate fondness for mathematics. It is his habit frequently to indulge in several hours of wrestling with problems of higher mathematics as a relief to his mind from the mental effort required in his official duties, and to sharpen his faculties in dealing with the problems of office. To his training in mathematics, together with his long experience in the practice of the law, Mr. Lansing attributes most of the success he has had. He once said he did not see how any man could undertake the solution of great problems without having had the mental discipline afforded by the study of mathematics.

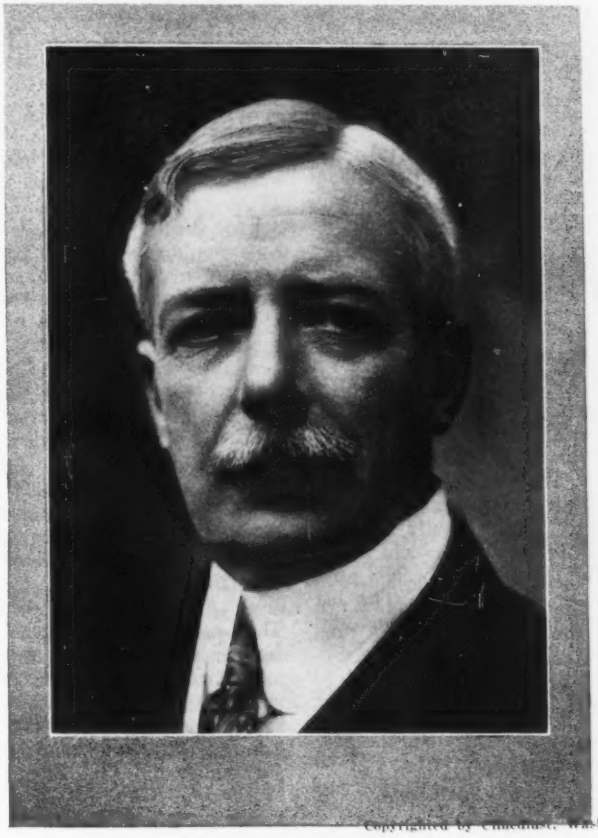
His mental processes are essentially analytical, as contrasted with the intuitive methods of his departed chief. Mr. Lansing's first question is: "What are the facts?"

It is one of the characteristics of the new Secretary that he is never too busy to smile, never too busy to be courteous and affable.

Another thing about the new Secretary which is conspicuous in these strenuous times is his remarkable self-possession. He is always cool and unruffled, almost to the point of imperturbability.

"In the photographs of Robert Lansing, our new Secretary of State," observes the Literary Digest "the features reveal in every line the qualities that all

the world has come to acknowledge as characteristically American. There are firmness, strength, persistency, energy, keen insight, fearless honesty, and humor,—the most necessary attributes of



HON. ROBERT LANSING

what we take pride in calling the American spirit, and which nowhere may more appropriately be found than in the Department of State.

"His reputation for quiet, dry humor is well recognized among his acquaintances. The chronicler relates one of the Secretary's favorite stories, which concerns that period of Mr. Lansing's career when he was practicing law in Watertown, New York, where the Lansings have long been prominent in the affairs of the state, ever since old John Lansing went as a delegate to the Constitutional Convention at Philadelphia in 1787. Mr. Lansing had once to appear before a newly elected justice of the peace, and one, it appears, who was not himself a lawyer, but the only substantial citizen available for the position. The case proceeded as follows:

In the course of the trial Mr. Lansing cross-examined a witness rather severely. The witness was stubborn, and either didn't or wouldn't catch the drift of the lawyer's questions, which had to be repeated several times.

"Mr. Lansing repeated a question five times without changing a single word in it. His tactics irritated the judge, and the lawyer was directed to ask a new

question. Instead he repeated the question a sixth time, determined to get the answer he was after.

" 'Mr. Counselor,' broke in the judge, 'I object to your asking that question again.'

"The question was once more repeated.

"Again the judge protested. 'Mr. Counselor,' he declared in an injured tone of voice, 'I object to your asking the same question over and over again.'

"Mr. Lansing was quick to take advantage of the judge's lack of judicial training.

" 'Your objection is overruled,' he snapped.

"This completely nonplussed the judge for a moment, but he recovered himself quickly and exclaimed defiantly, 'I take an exception!' "

"Mr. Lansing," writes James Brown Scott in the American Review of Reviews, "graduated from Amherst College in 1886, and, like his father and his distinguished ancestor, chose the legal profession. In 1889 he began the practice of law with his father at Watertown, and until quite recently he continued in private practice except when retained by his own and foreign governments in important cases. The list of these is very large and imposing, and only the more important can be mentioned.

"In 1892 he was appointed associate counsel for the United States in the Fur Seal Arbitration, and attended the sessions of the international tribunal held in Paris in 1893. In 1894–95 he was counsel for the Mexican and Chinese Legations at Washington. In 1896 he was appointed by Mr. Richard Olney, the Secretary of State, counsel for the government before the Bering Sea Claims Commission, and as such attended the Commission as representative of this government at its sessions held in Victoria, British Columbia, in 1896–97, and at Montreal and Halifax in the latter year.

"He was counsel for private parties before the Canadian Joint High Commission in 1898–99 and counselor for the Mexican and Chinese Legations at Washington in 1900–01. He was solicitor and counsel for the government before the Alaskan Boundary Tribunal in 1903, and attended the sessions of the tribunal at London in his official capacity. He was counsel for private parties in the Venezuelan asphalt disputes in 1905; counsel for the United States in the Atlantic Fisheries Arbitration at The Hague in 1908, and as such counsel attended the sessions of The Hague Tribunal which decided this longstanding and important dispute in 1910.

"He was technical delegate of the government in the Fur Seal Conference at Washington in 1911, and special counsel for the Department of State on various pending diplomatic questions, and for the negotiation with Great Britain of the claims to be arbitrated under the special agreement of 1910; in 1911 counsel for the United States in the American and British Claims Arbitration, and from 1913 to the date of his appointment as counselor, he was agent of the United States before this Commission.

"The questions with which Mr. Lansing was called upon to deal in arbitration cases were many and varied. They required for their settlement the disciplined mind of the lawyer trained in the common law. They also required a thorough grounding in international law. This is evident without argument or further statement, when it is borne in mind that among these cases Mr. Lansing was engaged in the Fur Seal Arbitration in 1892, the Alaskan boundary case decided in 1903, and the Atlantic Fisheries Arbitration at The Hague, decided in 1910.

"These three cases are the most important international disputes to which the United States has been a party since the famous Alabama case, decided in 1872. As a matter of fact, Mr. Lansing has represented the United States in more international arbitrations than any living American, and only a year ago a distinguished French authority, M. Henri Fromageot, stated, on learning of Mr. Lansing's appointment as counselor for the Department of State, that he had had a longer and broader experience in international arbitration and had appeared more frequently before

international tribunals than any living lawyer.

"Mr. Lansing has not, however, contented himself with the principles of international law involved in the various cases in which he has been retained as counsel. His interest in the theory of international law is as keen and searching as in its practice, and his knowledge of the one is as profound as his knowledge of the other. He recognized the services which foreign journals of international law render to the law of nations, and he appreciated as keenly as anyone, —more keenly than most,—the lack of a journal of international law published in the English language. He was therefore one of the founders of the American Society of International Law in 1906, and has been since its foundation a member of its executive committee. The American Journal of International Law was established a year later as the organ of the society. From its beginning Mr. Lansing has been an editor, and he has from time to time, as his professional engagements permitted, contributed to it articles, editorial comments, and book reviews."

It is because Mr. Lansing, through a lifelong training in international law and the business of governments with each other, is so firmly established in the principles that govern foreign relations that his appointment as Secretary is a wise one. His feet are planted firmly on the solid foundations of fact and principle; his training and experience have never admitted the coming into play of any theories of government or doctrines for the attainment of the idealists' dreams.

Mr. Lansing has had to deal with fact and conditions, and his judgments are based largely on the teachings of experience and what has happened before. He has no dreams to visualize, no hobbies to serve, and no illusions to overcome.

Mr. Lansing was born October 17, 1864, at Watertown, New York. He is the author of "Government, Its Origin, Growth, and Form in the United States," and of numerous articles on diplomatic subjects. In 1890 he was married to Miss Eleanor Foster, daughter of John W. Foster, Secretary of State under President Harrison.

Decease of Captain Muller.

Captain Anthony H. Muller, of New Iberia, Louisiana, died suddenly on June 19th, while on a visit to New Orleans.

He was born in Iberia parish August 5, 1871. After graduating from the local public schools, he entered St. Charles College at Grand Coteau, from which he was graduated with a B. A. degree. He obtained a law degree from Tulane University in 1893, and was admitted to the bar the same year. Captain Muller confined his practice to criminal law, and won almost instant recognition by his brilliant talents. He was one of the first to volunteer in the war with Spain, and was appointed to the captaincy of Company C of the First Louisiana Infantry. When the regiment was mustered out at the end of the war he received a handsome present from the soldiers under his command.

In 1900, Captain Muller was elected district attorney for Iberia parish, a position which he held at the time of his death.

From Lawyer to General

BY ALEX. F. OSBORN

WITH war ruling the world, the United States must think of its military,—which means its militia. The only complete National Guard is that of New York state. Its militia comprises 22,000 officers and men,—the only tactically entire army that Uncle Sam could put into the field if war were declared to-morrow.

Who commands this vital nucleus of the nation's defense? A young Irishman of forty, John F. O'Ryan.

Major General O'Ryan is simply a young lawyer. His god is efficiency, his life the militia. In fact, he is no longer a lawyer too. Now he is simply a soldier. For in 1911, when Governor Dix offered him General Roe's job, he told his Excellency that it would take eight days per week to do the work right. And General O'Ryan has found that there *is* more than enough work in the State National Guard to keep even him fairly busy.

How did Governor Dix happen to make him Major-General?

One reason was that General Grant happened to see the Governor and the Major together at a charity ball. General Grant said to the governor: "There is your logical successor to General Roe." That recommendation, added to the fact that General O'Ryan seemed to know so many officers of the regular Army, caused Governor Dix to make Major O'Ryan chief of the state's militia at the age of thirty-eight.

Up to that time he had been busy making a living at law. Then how did he happen to know so many officers of the regular Army? That fact was due to an article he wrote called "Organization, Maintenance, and Training of Field Batteries in Organized Militia." This was published in the most authoritative organ of the military profession. In the main it shot a new idea at the officers of the regular Army,—the thought that it was *not* all bunk about a "trained citizenry," —that it *was* possible to create a militia which could be relied on when defense was needed.

Perhaps the sheer courage of his claim was what won so much attention in Army circles. Such interest did it create that, for instance, *seven* years later, when General O'Ryan first met Assistant Secretary of War Oliver, the latter said: "You're not the man that wrote 'Organization, Maintenance, and Training of Field Batteries in Organized Militia,' are you?"

He wrote that paper at the age of thirty. Naturally, he then knew but little about the practice of military science,—at least not enough to interest regular officers of lifelong study. But the young captain had had enough experience to theorize. Practice proved later that his theory was O. K.

He was thinking of military problems all the while, and reading books like Napier's "Peninsular Campaign." This study of the field problems of Wellington from 1807 to 1814 opened up to him a flood of "hunches" as to what field exigencies might demand by way of basic training. That's why he could theorize in a fairly practical way.

This system—theorizing first and then executing the theory—is sort of Teutonic. And General O'Ryan is Irish. Where did he get this Teutonic instinct?

Perhaps it was the training of an old German teacher during his 'teens. Herr Professor got some Civil War veterans to chip in and buy some wooden guns for his lads. Then he drilled them. At the age of thirteen, General O'Ryan was a captain of far greater importance than any other captain in the world.

During law-school days, after he had gone as far as junior year in the City College of New York, he joined the Seventh Regiment. He was an inquisitive cuss. He kept asking questions of every regular officer he met,— especially Captain Gibson of the Seventh Cavalry. He never tired quizzing him about his fights with the Sioux Indians during the

CAPT. OLMSTED (Now Lt. Col. Adj. Gen. Div.)

MAJOR GEN. O'RYAN N. G. N. Y. Div.

LIEUT. J. L. KINCAID (Now Major) First Cav.

Sitting Bull campaign. Suddenly, Private O'Ryan of the Infantry was made second lieutenant in the First Battery of the Artillery; Captain Gibson was at the bottom of the appointment.

As artillery officer, he got off the startling idea that an artillery battery ought to have horses! He had stalls put in his armory. He changed the wooden floor into a tan-bark riding ring. Luckily, he knew how to get horses cheap. When a kid he used to see peddlers hang around the railroad yards, buy an unbroken western steed for $40, hitch him to an old cart and then fly off, the horse only knew where. So Lieutenant O'Ryan bought one horse for $40. They rented him out at $1 an hour. In less than a month the horse had earned his cost. But he went lame, and the battery sold him for $60. And that, mind you, was the beginning of the use of real live horses in the National Guard.

In New York city there was another battery known as "Wendell's." Every time anyone mentioned this organization, people laughed. They were a public joke. At last scandal pointed its finger at them. Graft was charged; it was whispered that the employees' salaries were being "divied up" with someone.

Governor Hughes acted. General Roe put Lieutenant O'Ryan in as captain. His new command of about 100 so-called artillerymen hardly knew a horse's mane from his tail. Immediately he tore up their by-laws right before their eyes. Also he told them they were going to be artillerymen, and they were going to drill four nights a week instead of one.

Then Captain O'Ryan fired sixteen out of the eighteen employees, and enlisted sixteen members from the regular Army. They were to fill these paid jobs, and, at the same time, to form part of the battery's enlisted strength. That was the start of the sergeant-instruction system, which is being adopted throughout the country to-day. Likewise, Captain O'Ryan further shattered traditions and abolished the beautiful ball-room floor, putting 50 tons of dirty tan-bark in its place.

He spent from 8:30 to 9:30 at the armory each morning and from 4:30 to 10:30 at night. His command finally became a real battery. From near bankruptcy, they got to own forty horses and mules, and a farm of 130 acres worth $30,000.

Captain O'Ryan, by this time, had had experience with artillery as well as infantry. Now he became a cavalryman. About forty men from the Seventh formed a "Rough Riding Club" to get

a glimpse at cavalry work. It made a fairly good troop. In acting as instructor for six years the young artillery captain learned a whole lot about the military pedagogy, and quite a little about cavalry.

The major-general is a sort of a "regular." He has just finished a year at the War College with the twenty-four other student officers, all of them of the rank of major or above. He is the only militiaman ever selected. General Wood, Commander-in-Chief of the United States Army, was his sponsor. All of his fellow students had been chosen because each was a specialist in particular lines.

Major-General O'Ryan has no fads. But his thirst for efficiency does make him a Don Quixote against one thing,—the ball-room floor, formerly the main feature of the usual armory. He wants to see his citizen-soldiers lose their terrible "ball-room step," which makes them walk as if they feared that they might slip and fall,—a habit due to drilling on the polished floors of state armories.

Another reason why he wants dirt floors is that such may make possible a training which will stand by a man when he is in the field. For a soldier has got to know Mother Earth. His life brings him as close to the soil as a cave-dweller's. He digs in it when in battle. He buries his dead comrade in the ground. He even lives in a trench.

"So," asks General O'Ryan, "why should the armory, which is the factory that produces the soldier, produce a product that is used to ball-room floors, and not to earth?"

A soldier should know how to shove a shovel, as well as aim a gun. And he certainly ought to be able to build a little fire. Yet, time after time, General O'Ryan has asked men (men who are far above the average in the militia), to build individual fires, and they have usually constructed conflagrations.

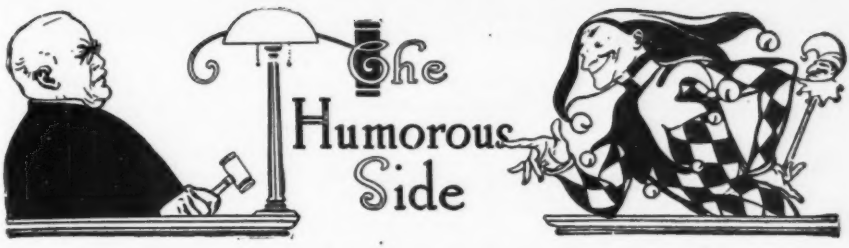
The general wants some kind of a floor that men can pitch tents on, build fires on, and dig in. Yes, and most advanced thinkers among the militia officers throughout the country are already at work to abolish the "accursed" ball-room floor, as the general terms it.

"Yes," many say, "but how can you attract men if you don't have dancing, and a running track?"

General O'Ryan does not want the man who enlists for social reasons.. He believes that the militia of this country can be made so worth while that red-blooded citizens will become militiamen out of pride and self-respect.

If there must be a bait, he believes the "pay" bill is the answer. By this measure the militiamen will be paid a slight fraction of what his brother in the regular Army gets. The general has already tried out a similar system in connection with Company F of the 74th Regiment. A proposition to pay one day's wages a week for two drills a week, of two hours and fifteen minutes each, brought in over 200 applicants. They got sixty unusually good men, many of them men with education, professional and otherwise,—fit caliber for future officers.

According to General O'Ryan's word and deed, the militia of the United States *can* be made into an effective fighting force. He, along with the regular officers at Washington, believes that the keystone of our country's defense cannot rest on any increase in the regular Army, but on the efficiency of our trained citizenry. They assert, with General O'Ryan, that our nation needs 1,000 more regular officers, and other improvements within reason. But, above all, they have faith in General O'Ryan's fight to instill into National Guardsmen a businesslike desire to be soldiers.



The world is a wheel, and it will all come round right.—Disraeli.

Thoughtless. "Your Honor," said the arrested chauffeur. "I tried to warn the man, but the horn would not work."

"Then why did you not slacken speed rather than run him down?"

A light seemed to dawn upon the prisoner. "That's one on me. I never thought of that."

A Mere Abstraction. Green—"I've a new car that's a beauty. It runs so smoothly that you can't feel it. Perfectly noiseless; no odors; and, as for speed, it whizzes! You can't see it go by!"

Friend—"Can't feel it, can't hear it, can't smell it! I say how do you know you have a car at all?"—Minneapolis Journal.

Wise. Carr—"I have to warn my chauffeur continually to keep down his speed."

Barr—"Afraid of breaking the law, eh?"

Carr—"The law be blowed! Afraid of his breaking my precious head."—Boston Transcript.

The Reasonable Excuse. "You say you had your eyes open, with a good grip on the wheel and your foot on the brake?"

"Yes."

"Then how in Tophet did the accident happen?"

"Easy. I had to sneeze."

Bait. The attention of a taxi-driver was called to a purse lying on the floor of his car. He carefully looked around and then remarked confidentially:

"Well, sir, when business is bad I sometimes put it there and leave my door open. The purse is empty, of course, but you have no idea what a number of people jump in for a short drive. I've had five within the last hour, sir."—N. Y. Evening Post.

Costly. "I always get rattled when I see a woman crossing the street ahead of me," said the first motorist.

"So do I," replied the second ditto. "They wear such a lot of pins in their hats and hair that if a fellow collides with them he is almost sure to puncture a tire."—Minneapolis Journal.

Hidden Dangers. Motorist (to chauffeur)—"Be careful about running over anybody hereabouts. This is a prohibition county, and most everybody has a bottle in his pocket."—Atlanta Constitution.

Justice of the Peace. "A11 right," fumed Jiblets, handing over $10. "I'll pay, but let me say to your Honor that it is rank injustice. Why, look at the damage to my car from your rotten roads, the mud's an inch thick on every bit of that machine."

"Thet's where the justice comes in," smiled the local Solomon. "At $4 a load, it'll cost us about $10 restorin' the mud your old machine has been a-gatherin' up outen our highways."

A Just Judge. "It's all right to fine me, Judge," laughed Barrowdale, after the proceedings were over, "but just the same you were ahead of me in your car, and if I was guilty you were too."

"Ya-as, I know," said the judge, with a chuckle. "I found myself guilty, and hev jest paid my fine into the treasury same ez you."

"Bully for you!" said Barrowdale.

"By the way, do you put these fines back into the roads?"

"No," said the judge. "They go to the trial justice in loo o' sal'ry."—Harper's Weekly.

Where the Costs Come In. The justice of the peace scratched his head reflectively.

"There seems to be some dispute as to the facts in this case," he said. "The law imposes a fine of $25 for exceedin' the speed limit, but I don't want to be arbitrary about it, and if ye'll pay the costs I'll remit the fine."

"That's satisfactory to me," said Dawkins, taking out his wallet.

"All right," said the justice. "There's $5 for the sheriff, $5 for the pros-cutin' attorney, $5 for the court stenographer, $5 for the use of the courtroom, an' my reg'lar fee o' $10 per case. Thutty dollars, please."—Harper's Weekly.

Multitudinous Details. "Life in the country is easier than it used to be."

"Mebbe it is," answered Farmer Corntossel "But it's kind o' confusin'. This mornin' I got absent-minded an' put a bunch o' hay in front of the automobile an' tried to make the hoss swallow four gallons of gasolene."—Washington Star.

Her Preference. Judge (in divorce case)—"Whom do you prefer to live with, my child—your father or your mother?"

Child—"If you please, sir, which ever gets the motor car."

Guilty of Something. In certain sections of West Virginia there is no liking for automobilists, as was evidenced in the case of a Washingtonian who was motoring in a sparsely settled region of the state.

This gentleman was haled before a local magistrate upon the complaint of a constable. The magistrate, a good-natured man, was not, however, absolutely certain that the Washingtonian's car had been driven too fast, and the owner stoutly insisted that he had been progressing at the rate of only 6 miles an hour.

"Why, your Honor," he said, "my engine was out of order, and I was going very slowly because I was afraid it would break down completely, I give you my word, sir, you could have walked as fast as I was running."

"Well," said the magistrate, after due reflection, "you don't appear to have been exceeding the speed limit, but at the same time you must have been guilty of something, or you wouldn't be here. I fine you $10 for loitering."—Lippincott's.

An Unruly Machine. "Little girl, does your papa have much trouble with his automobile?"

"Yes, sir. He has as much trouble with it as if he was married to it."—Judge.

Calculating Gerald. Gerald had just bought a little car, and in it he was taking the girl of his heart for a spin between tea and supper.

Proud of being able to turn a corner without seriously damaging the hedges, he was letting the car out a bit. Up hill and down dale they tore at a gallant pace.

"Oh, Gerald, isn't it l-o-vely?" chanted Hypatia, as they topped a mighty hill and beheld the country spread out far below them.

But she got no answer, for they were already dashing downwards like the stick of a rocket. Gerald, with a moist forehead and bulging eyes, shouted in her ear:

"The brakes have given way!"

"Oh, Gerald, how awful!" Shrieked the poor girl, beginning to cry. "Can't you stop it? Oh, Gerald, dear, I'd give all the money in the world to get out!"

"Don't part with a ha'penny!" gasped Gerald, who was of Scotch descent. "We'll both get out for nothing when the car hits that gate down there!"—Exchange.

Plastered. As he crawled out of the wreck of his auto a solicitous friend asked: "Are you covered?" "Yes," he said, sadly. "With mud, blood, chagrin, and insurance. Is that enough?"—Detroit "Free Press."

INDEX